In the

United States Court of Appeals

For the Seventh Circuit

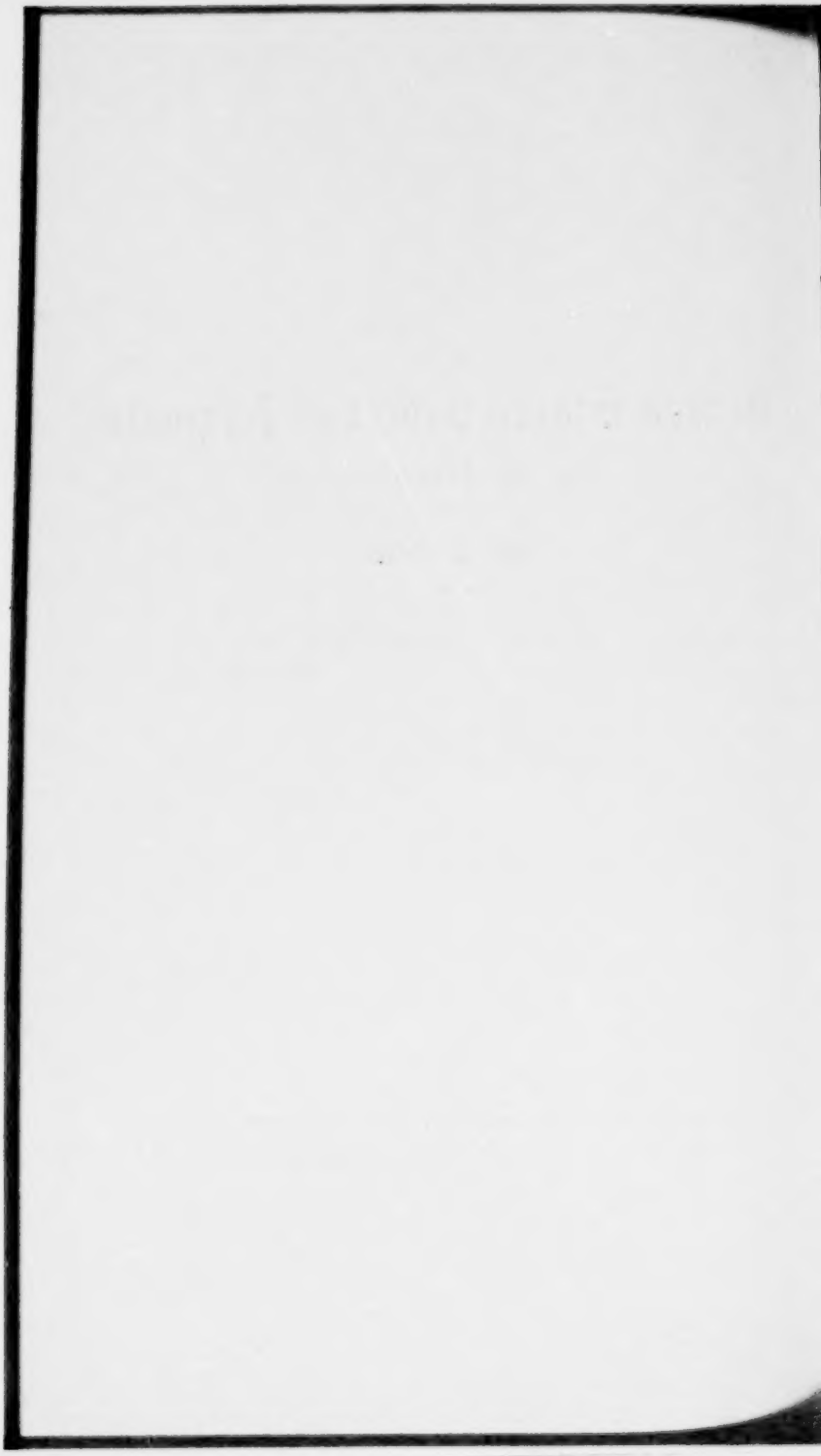
No. 10936

MARTIN P. DURKIN, SECRETARY OF LABOR,
Plaintiff-Appellee,

vs.

JOYCE AGENCY, INC.
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.



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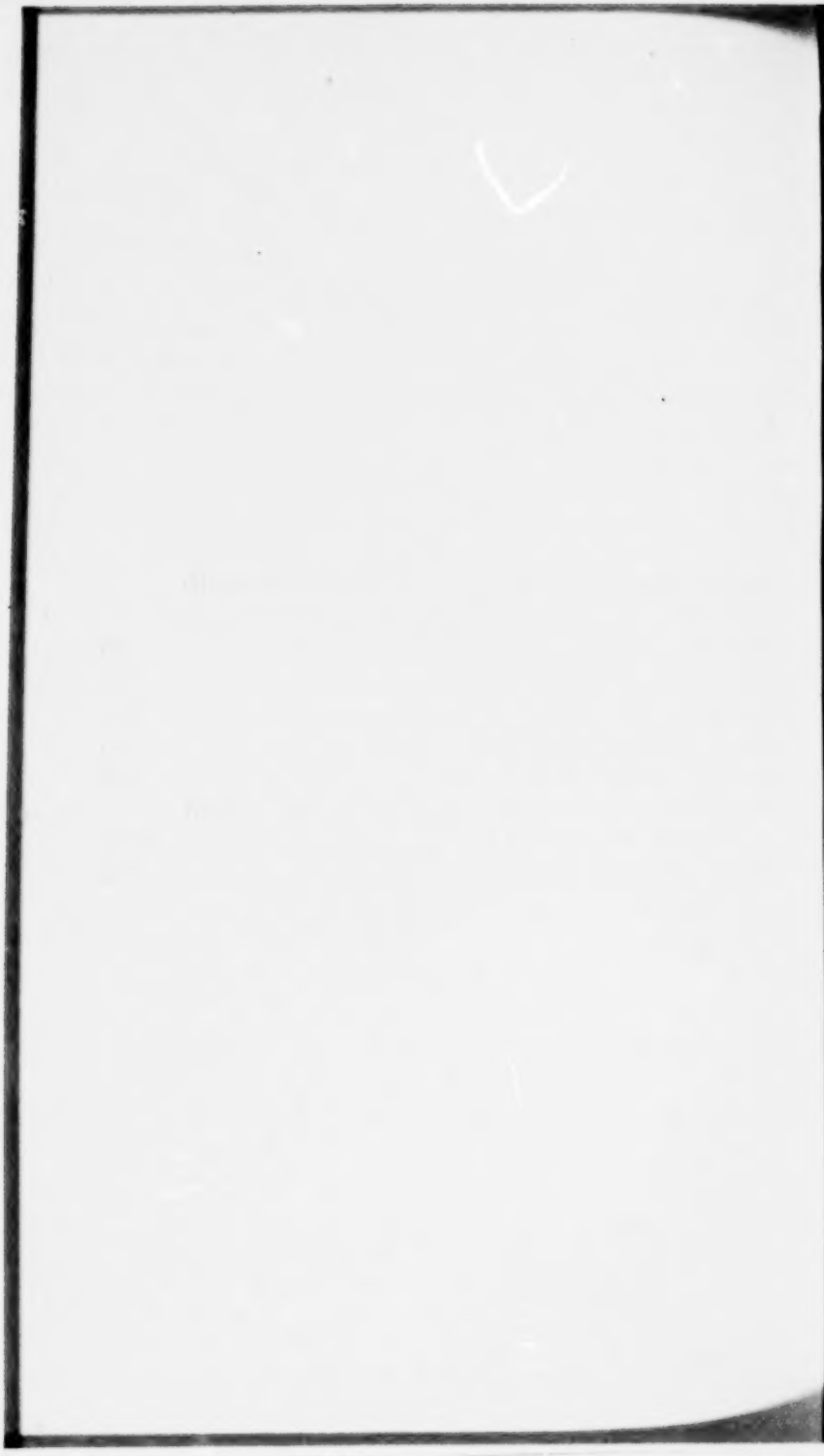

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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of May (it being the 4th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Three and of the Independence of the United States of America, the 177th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable William H. Holly, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable J. Sam Perry, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Thursday, May 7, 1953.

Court met pursuant to adjournment.

Present: Honorable J. Sam Perry, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

Martin P. Durkin, Secretary of Labor, *Plaintiff-Appellee,* *vs.* Joyce Agency, Inc., a corporation, *Defendant-Appellant.*	Civil Action No. 49 C 1558.

STATEMENT IN ACCORDANCE WITH RULE 10(b) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

1. The time of the commencement of the suit: October 13, 1949.

2. The original parties were: William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff, *vs.* Joyce Agency, Inc., a corporation, Defendant.

By order of Court of June 12, 1950, Maurice J. Tobin, Secretary of Labor, was substituted as plaintiff in the place of William R. McComb.

By order of Court of February 24, 1953, Martin P. Durkin, Secretary of Labor, was substituted as plaintiff in the place of Maurice J. Tobin.

3. The complaint was filed on October 13, 1949; the answer was filed on December 8, 1949; and the amended answer was filed on April 14, 195.

4. The trial was held on April 11, 1952, before Judge J. Sam Perry.

3 5. Final judgment was entered on May 7, 1953, and notice of appeal was filed on July 1, 1953.

Stanford Clinton,
Attorney for Defendant-Appellant,
134 North LaSalle Street,
Chicago 2, Illinois.
Robert A. Sprecher,
Attorney for Defendant-Appellant,
100 West Monroe Street,
Chicago 3, Illinois.

Endorsed: In the United States District Court * * (Caption—49-C-1558) * * Statement in accordance

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with rule 10(b) of the rules of the United States Court of Appeals for the Seventh Circuit Stanford Clinton 134 N. LaSalle Street DE 20525 Robert A. Sprecher 100 W. Monroe Street RA 6-2632

5 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1558) * *

Be It Remembered, that on to wit, the 13th day of October, 1949, the above-entitled action was commenced by the filing of the following Complaint in the Clerk's Office of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to wit:

6 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1558) * *

COMPLAINT.

I.

Plaintiff brings this action to enjoin defendant from violating the provisions of Section 15(a)(2) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U.S.C. Title 29, Sec. 201 et seq.) hereinafter called the Act.

II.

Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III.

Defendant is, and at all times hereinafter mentioned was, a corporation organized and existing by virtue of the laws of the State of Illinois, having its office and place of business at 343 South Dearborn Street, in the City of Chi-
7 cago, State of Illinois, within the jurisdiction of this Court. The defendant has been engaged in, and is engaged in, furnishing watchmen and detectives for Goldblatt Bros., Inc. and Martin Food Products, Inc., a subsidiary of Goldblatt Bros., Inc.

IV.

At all times hereinafter mentioned, Goldblatt Bros., Inc., has been and is maintaining and operating a warehouse and garage at 3161 South Ashland Avenue, Chicago, Illinois, where it is engaged in the receipt, unloading, uncrating, handling, storing, assembling, repairing, finishing, polishing, and producing furniture. Within the same building, it also maintains and operates a large garage which houses numerous trucks, trailers, and tractors used by Goldblatt Bros., Inc. for hauling, delivering, and transporting of goods in interstate and intrastate commerce.

At all times hereinafter mentioned, defendant employed and is employing approximately 10 employees at the aforesaid warehouse and garage at 3161 South Ashland Avenue, Chicago, Illinois, in interstate commerce, in the production of goods for interstate commerce, and in processes or occupations necessary to such production, viz: patroling, watching, guarding, protecting from fire, trespass, and other hazard, the equipment, physical structure, and goods and properties therein contained; checking in and out trucks, trailers, tractors, and railroad freight cars; placing seals on loaded trucks and trailers, and maintaining records of the said seals and movement of the trucks, trailers, and tractors. A substantial portion of said goods is received from states other than the State of Illinois, and a substantial portion of the goods produced by these employees
8 has been, and is being, produced for interstate commerce and has been, and is being, shipped, delivered, transported, offered for transportation and sold in interstate commerce, from said place of business to other states.

V.

At all times hereinafter mentioned, Goldblatt Bros., Inc. has been and is maintaining and operating a grocery warehouse at 201 East 63rd Street, Chicago, Illinois, where it is engaged in the receipt, unloading, handling, storing, packaging, packing, and producing of foods, groceries, liquors, candies, and cookies.

At all times hereinafter mentioned, defendant employed and is employing approximately 5 employees at the aforesaid warehouse at 201 East 63d Street, Chicago, Illinois, in interstate commerce, in the production of goods for interstate commerce, and in processes or occupations neces-

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sary to such production, viz: patroling, watching, guarding, protecting from fire, trespass, and other hazard, the equipment, physical structure, and goods and properties therein contained; checking in and out trucks, trailers, and tractors; placing seals on loaded trucks and trailers; maintaining records of the said seals and movement of the trucks, trailers, and tractors; and maintaining the water in the boiler at the heating plant at proper levels. A substantial portion of said goods is received from states other than the State of Illinois, and a substantial portion of the goods produced by these employees has been, and is being, produced for interstate commerce and has been, and is being, shipped, delivered, transported, offered for transportation, and sold in interstate commerce from said place of business to other states.

VI.

9 At all times hereinafter mentioned, Goldblatt Bros., Inc. has been and is maintaining and operating a general merchandise warehouse at 3913 South Wentworth Avenue, Chicago, Illinois, where it is engaged in the receipt, handling, unpacking, storing, assembling, repacking, and distributing general merchandise.

At all times hereinafter mentioned, defendant employed and is employing approximately 8 employees at the aforesaid warehouse at 3913 South Wentworth Avenue, Chicago, Illinois, in interstate commerce, in the production of goods for interstate commerce, and in processes or occupations necessary to such production, viz.: patroling, watching, guarding, protecting from fire, trespass, and other hazards, the equipment, physical structure, and goods and properties therein contained; checking in and out trucks, trailers, and tractors; placing seals on loaded trucks and trailers, and maintaining records of the said seals and movement of the trucks, trailers, and tractors. A substantial portion of said goods is received from states other than the State of Illinois, and a substantial portion of the goods produced by these employees has been, and is being, produced for interstate commerce and has been, and is being, shipped, delivered, transported, offered for transportation, and sold in interstate commerce from said place of business to other states.

VII.

At all times hereinafter mentioned, Goldblatt Bros., Inc. has been and is maintaining and operating a warehouse on Wabash Avenue between Jackson Boulevard and Van Buren Street, where goods are manufactured and produced, a substantial part of which goods is produced for and regularly shipped in interstate commerce.

At all times hereinafter mentioned, defendant employed and is employing approximately 2 employees in the production of goods for interstate commerce, and in processes or occupations necessary to such production, viz.: patroling, watching, guarding, protecting from fire, trespass, and other hazard, the equipment, physical structure, and goods and properties therein produced and contained. A substantial portion of the goods produced by these employees has been, and is being, produced for interstate commerce and has been, and is being, shipped, delivered, transported, offered for transportation, and sold in interstate commerce from said place of business to other states.

VIII.

At all times hereinafter mentioned, Goldblatt Bros., Inc. operated and are operating a bakery and food-processing establishment at 2608 West Lexington Street, Chicago, Illinois, where bakery goods and cooked foods, such as fowl, fish, ham, and other meats are manufactured and produced.

At all times hereinafter mentioned, defendant employed and is employing approximately 3 employees at the bakery and food-processing establishment at 2608 West Lexington Street, Chicago, Illinois, in interstate commerce, in the production of goods for interstate commerce, and in processes or occupations necessary to such production, viz.: patroling, watching, guarding, protecting from fire, trespass, and other hazard, the equipment, physical structure, the goods and properties therein contained, and in checking in and out both persons and property. A substantial portion of the raw materials received for such production is received from states other than the State of Illinois. A substantial portion of the goods produced by these employees has been, and is being, produced for interstate commerce and has been, and is being, shipped, delivered, transported, offered for transportation, and sold in

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interstate commerce from said place of business to other states.

IX.

At all times hereinafter mentioned, Martin Food Products, Inc. maintain and has maintained a food manufacturing establishment at 3641 South Iron Street, Chicago, Illinois, where it is engaged in the production and manufacture of jams, jellies, peanut butter, and like goods.

The defendant has employed approximately 3 employees in said establishment of Martin Food Products, Inc. at 3641 South Iron Street, Chicago, Illinois, in interstate commerce, in the production of goods for interstate commerce, and in processes or occupations necessary to such production, viz.: patroling, watching, guarding, protecting from fire, trespass, and other hazard, the equipment, physical structure, the goods and properties therein contained, and in checking in and out both persons and property. A substantial portion of the raw materials received for such production is received from states other than the State of Illinois. A substantial portion of the goods produced by these employees has been, and is being, produced for interstate commerce and has been, and is being, shipped, delivered, transported, offered for transportation, and sold in interstate commerce from said place of business to other states.

12

X.

At all times hereinafter mentioned, defendant employed and is employing approximately 6 employees in and about its office and place of business in Chicago, Illinois, in interstate commerce, in the production of goods for interstate commerce, and in processes or occupations necessary to such production, viz.: in providing its customers with watchmen and detectives, in assigning and directing its employees enumerated in the foregoing paragraphs, and in keeping books, records, and payrolls, and in performing the clerical work incidental to and a part of the operations of its business and the work of its employees. A substantial portion of the goods produced by these employees has been, and is being, produced for interstate commerce and has been, and is being, shipped, delivered, transported, offered for transportation, and sold in interstate commerce from the aforesaid places of business to other states.

XI.

Defendant repeatedly has violated and is violating the provisions of Sections 7 and 15(a)(2) of the Act by employing its employees in interstate commerce and in the production of goods for interstate commerce, as aforesaid, for workweeks longer than 40 hours, since October 1, 1947, without compensating the employees for their employment in excess of 40 hours, in workweeks during such period, at rates not less than one and one-half times the regular rate at which they were employed.

13 XII.

Defendant has, since October 1, 1947, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Section 15(a)(2) of the Act, and directing that said defendant make reparation to its employees in the amounts due to them by reason of the violations of the Act set forth herein, and such other and further relief as may be necessary and appropriate.

William S. Tyson,
Solicitor,
Herman Grant,
Regional Attorney,
Richard W. Proctor,
Attorney,
Attorneys for Plaintiff United States Department of Labor.

P. O. Address
United States Department of Labor
Wage and Hour Division
1200 Merchandise Mart
Merchandise Mart Plaza
Chicago 54, Illinois

• • • • •

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18 And afterwards on, to wit, the 8th day of December, 1949 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer in words and figures following, to wit:

19 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1558) * *

ANSWER OF JOYCE AGENCY, INC.

1. Defendant admits the allegations contained in Paragraphs I and II.

2. Defendant admits the allegations of Paragraph III except that it denies that it presently does or for some time past has furnished watchmen and detectives for Martin Food Products, Inc.

3. Defendant admits the allegations contained in Paragraph IV except that it denies that any of said employees is engaged in interstate commerce and except that it states that the amount of production of goods for interstate commerce which occurs within said premises is insignificant and negligible and occurs within a retail establishment or is performed by employees engaged in a local retailing capacity as that term is defined and delimited by the Administrator.

Defendant further denies that any substantial quantity of goods produced by any employee in said premises has been and is being shipped, delivered, transported, offered for transportation and sold in interstate commerce from said place of business to other states.

20 4. Defendant admits the allegations of Paragraph V except that it denies that it is engaged in producing any foods, groceries, liquors, candies and cookies at said warehouse, and except that it denies that any employees in said building are engaged in the production of goods for interstate commerce or in processes or occupations necessary to such production, or that any goods produced by its employees on said premises is being shipped, delivered, transported, offered for transportation and sold in interstate commerce.

5. Defendant admits the allegations of Paragraph VI except that it denies that any employees employed at said warehouse are engaged in the production of goods for inter-

state commerce or processes or occupations necessary to such production, or that any goods produced by its employees on said premises is being shipped, delivered, transported, offered for transportation and sold in interstate commerce.

6. Defendant admits the allegations contained in Paragraph VII of the Complaint but states that the goods produced by defendant's employees in said premises is infinitesimal.

7. Defendant admits the allegations of Paragraph VIII except that it denies that it cooks food such as fowl, fish, ham and other meats within said premises.

Defendant further alleges that all of its employees working within said premises are now and for a long period prior to the filing of this Complaint were employed in conformity with the labor standards of the Act.

8. Defendant admits the allegations contained in Paragraph IX. Defendant further alleges that it presently
21 has no employees at Martin Food Products, Inc. and has not had any employees at said premises for a long time prior to the filing of the Complaint.

9. Defendant admits the allegations of Paragraph X except that it denies that any of its employees at its office are engaged in the production of goods for interstate commerce and in processes or occupations necessary to such production, or that any goods produced by its employees on said premises is being shipped, delivered, transported, offered for transportation and sold in interstate commerce.

10. Defendant denies the allegations of Paragraph XI except that it admits that in an inconsequential number of instances the defendant violated the provisions of Sections 7 and 15(a)(2) of the Act and alleges that said violations have long since ceased.

11. Defendant further alleges that its previous violations of the Act were committed under a misapprehension and misconstruction of the applicable law; that upon being advised by the representatives of the Wage and Hour Division of the existence of violations, it promptly ceased and desisted said violations.

Defendant further alleges that it has every intention in utmost good faith to hereafter comply with the labor standards imposed by the Act and that it is utterly unnecessary for the injunctive power of this Court to be invoked.

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Wherefore, defendant respectfully prays that this proceeding be dismissed.

Joyce Agency, Inc.
By Edwin G. Boltz, Sr.

Stanford Clinton and Jay A. Pritzker,
Post Office Address:
134 North LaSalle Street,
Chicago 2, Illinois.

22 State of Illinois, } ss.
County of Cook, }

Edwin G. Boltz, Sr., being first duly sworn deposes and says that he is the President of Joyce Agency, Inc. and that he is duly authorized by the defendant, Joyce Agency, Inc., in this behalf; that he has knowledge of the facts and that the foregoing Answer by him subscribed on behalf of Joyce Agency, Inc. is true.

Edwin G. Boltz, Sr.

Subscribed and sworn to before me this 7th day of December, A. D. 1949.

Honora Harris,
(Seal) *Notary Public.*

* * * * *

27 And afterwards on, to wit, the 12th day of June, 1950, came the Plaintiff by his attorneys and filed in the Clerk's office of said Court his certain Notice And Motion in words and figures following, to wit:

28 In the United States District Court.
* * (Caption—49-C-1558) * *

NOTICE.

To: Pritzker, Pritzker & Clinton,
134 North LaSalle Street,
Chicago 2, Illinois.

You will please take notice that on Friday, June 9, 1950, at the opening of court in the forenoon or as soon thereafter as counsel can be heard, we shall appear before the Hon. William J. Campbell, Judge of the United States District Court, in Room 757, United States Court House, at Chicago, Illinois, or before such other judge as may be sitting in his place and stead, and then and there move that

Maurice J. Tobin, Secretary of Labor of the United States, be substituted as party plaintiff and this cause continued in his name.

At which time and place you may appear if you see fit.

Dated: June 7, 1950.

William S. Tyson,
Solicitor,
Herman Grant,
Regional Attorney,
Richard W. Proctor,
Attorney,
Attorneys for Plaintiff.

29 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1558) * *

MOTION.

To: The Honorable William J. Campbell,
Judge of the United States District Court.

Now come the attorneys for plaintiff and suggest that Maurice J. Tobin is the duly appointed, qualified and acting Secretary of Labor of the United States. Under the provisions of Reorganization Plan No. 6, dated March 13, 1950, effective May 24, 1950, issued under the Reorganization Act of 1949, tit. 5 U.S.C., sect. 133z et seq., the function of the Administrator of the Wage and Hour Division, United States Department of Labor, in conducting this litigation has been transferred to the Secretary of Labor. There is a substantial need for the continuing of this action.

Plaintiff moves that Maurice J. Tobin, Secretary of Labor of the United States, be substituted in lieu and instead of William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, as
30 party plaintiff herein, and that this cause be continued in the name of Maurice J. Tobin, Secretary of Labor of the United States, Plaintiff.

Respectfully submitted this 7th day of June, A. D. 1950.

William S. Tyson,
Solicitor,
Herman Grant,
Regional Attorney,
Richard W. Proctor,
Attorney,
Attorneys for Plaintiff.

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31 State of Illinois, } ss:
County of Cook, }

AFFIDAVIT.

Phyllis M. Fitzgerald, being first duly sworn, on oath deposes and says that she is employed by the Office of the Solicitor, United States Department of Labor, and that she mailed the copies of the foregoing Notice, Motion referred to therein and the proposed Order to:

Pritzker, Pritzker & Clinton,
134 North LaSalle Street,
Chicago 2, Illinois,

by depositing said copies in the United States Post Office located in the Merchandise Mart, Chicago, Illinois, before 5:00 p. m. on the 7th day of June, A. D., 1950, in an envelope addressed as above set forth and bearing official notice of the Office of the Solicitor, United States Department of Labor.

Phyllis M. Fitzgerald.

Subscribed and sworn to before me this 7th day of June A. D., 1950.

Bertha K. Hoffmann,
(Seal) *Notary Public.*

32 And on the same day, to wit, on the 12th day of June, 1950, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry, to wit:

33 In the United States District Court.
* * (Caption—49-C-1558) * *

ORDER.

This cause coming on to be heard upon the Motion of the plaintiff herein to substitute Maurice J. Tobin, Secretary of Labor of the United States as party plaintiff; it appearing to the court that there is substantial need for continuing this action:

It is Ordered, Adjudged, and Decreed that Maurice J. Tobin, Secretary of Labor of the United States, be and he is hereby substituted in lieu and instead of William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, as party plaintiff herein; and

It is Further Ordered that this action be continued in the name of Maurice J. Tobin, Secretary of Labor of the United States, Plaintiff, all without prejudice to the proceedings already had in this action.

Dated June 12, 1950.

Campbell,
United States District Judge.

* * * * *

36 And afterwards on, to wit, the 13th day of November, 1951, came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation of Facts, And Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14-A, 14-B, 14-C, 14-D, 14-E, 14-F, 14-G, 14-H, and 15 in words and figures following, to wit:

(The originals of the Stipulation of Facts and Exhibits are incorporated herein by direction of this Court, and transmitted separately for convenience):

37 IN THE UNITED STATES DISTRICT COURT

* * (Caption—49-C-1558) * *

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto, as follows:

1.

Defendant, Joyce Agency, Inc., is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Illinois, and maintains its central office and place of business at 343 South Dearborn Street, Chicago, Illinois.

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2.

The defendant has been, and is, engaged in the business of furnishing watchman, guard, detective, fire inspection, and shopping service to Goldblatt Bros., Inc. Defendant employs 72 employees in its business.

3.

Goldblatt Bros., Inc., hereinafter called "Goldblatt,"
38 an Illinois corporation, owns and operates a chain of 14 retail department stores. Of these stores, 10 are in the city of Chicago and one in each of the cities of Joliet, Illinois; Hammond, Gary, and South Bend, Indiana. It has a central office in Chicago, Illinois, where the administrative work in connection with Goldblatt's organization is performed, including the purchase of various kinds of merchandise usually found in a large department store. To service its 14 department stores, Goldblatt maintains in Chicago, Illinois, warehouses at 3913 Wentworth Avenue, 3161 South Ashland Avenue, 201 East 63rd Street, and 328 South Wabash Avenue, and a bakery at 2608 West Lexington Street.

The total sales volume of all Goldblatt's stores for the fiscal years ending January 31, 1950 and January 31, 1951 was $90,120,214 and $94,957,514, respectively. Of these amounts, $17,369,674 for the fiscal year 1950, and $18,913,500 for the fiscal year 1951, represent sales by Goldblatt's stores in Hammond, Gary, and South Bend, Indiana.

4.

Wentworth Warehouse.

a. Goldblatt maintains a warehouse at 3913 South Wentworth Avenue, Chicago, Illinois, hereinafter called the "Wentworth Warehouse." This warehouse is bounded by Wentworth Avenue on the west, LaSalle Street on the east, 39th Street on the north, and the railroad tracks, about 40th Street, on the south. It contains 350,000 square feet of floor space and consists of three interconnected buildings. One building is a 7-story building facing LaSalle Street, bounded on the north by 39th Street, and on the south by the railroad tracks. The second is a 3-
39 story building facing on Wentworth Avenue extending back to the 7-story building. The third is a long 1-story building facing Wentworth Avenue, extending from

the south wall of the 3-story building to the railroad tracks, and west from Wentworth Avenue to the 7-story building. Blueprints of the first and second floors of the Wentworth Warehouse are attached hereto, marked Exhibits 1 and 2, incorporated herein, and made a part hereof.

b. On the first floor level of the 7-story building and facing LaSalle Street is a receiving platform approximately 370 feet long where goods brought into the Wentworth Warehouse by truck and trailer are received. This platform has 22 receiving doors, through 9 of which goods are brought into the warehouse. Opening onto the receiving platform at appropriate intervals are six freight elevators which are used in transporting goods from the receiving platform to the various stock departments in the Wentworth Warehouse. On the second floor level of the 7-story building, and facing LaSalle Street, is an elevated railroad siding running the full length of the building inside of the east wall. From railroad freight cars on this railroad siding incoming goods are received and unloaded directly into three freight elevators. These freight elevators are used in transporting goods to various parts of the warehouse. In the basement of the 7-story building is located the engine room. The engine room contains the heating equipment, boiler, and pumps for the fire control pressure sprinkler system. The engine room furnishes the heat and pressure for the three buildings composing the Wentworth Warehouse. The warehouse is equipped throughout with a pressure sprinkler system.

c. The 3-story building is known as the Administration building. Goldblatt's offices for the administration of the Wentworth Warehouse are located on the first floor. The entrance to the Administration building, at 3913 Wentworth Avenue, serves also as the entrance or "front door" to the Wentworth Warehouse for all persons employed in the said warehouse and for all visitors to the warehouse. All mail is received or dispatched through this "front door." This "front door" is equipped with a time lock. The lock contains a tape upon which a record is made each time the door is unlocked. The tape is used as a check, by defendant's day front door guard and house detective, on all entries or departures made at the Wentworth Warehouse outside of business hours. Two freight elevators located in the west wall of the 7-story building open into both the 7-story building and the 3-story Administration building. Merchandise is warehoused on all floors and basement of the Administration building.

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d. The 1-story building facing Wentworth Avenue is the shipping department of the Wentworth Warehouse. The wall of this building facing on Wentworth Avenue has 12 steel doors. These doors permit the ingress and egress of trucks and trailers. Within the building is a loading and shipping platform approximately 250 feet long and 80 feet deep. A portion of the platform is divided into narrow alleys designated "store runs"; each Goldblatt department store is assigned a "store run" where goods are assembled for shipment and where goods remain pending
41 loading and transportation to said Goldblatt department store. This platform is set back far enough from the entrance so that trucks and trailers can be backed up against the platform and be completely within the building. The bed of the trailer is normally the same level as the loading dock. The platform has the capacity for and does actually handle 20 trucks and trailers simultaneously.

5.

a. Approximately 70 per cent of the goods received at the Wentworth Warehouse is regularly and daily received in interstate commerce from points outside of the State of Illinois. Merchandise having a sales value of over 30 million dollars was received at this warehouse during each of the fiscal years ending January 31, 1950 and 1951. Approximately 20 per cent of the merchandise shipped from the Wentworth Warehouse is shipped to Goldblatt's stores in Hammond, Gary, and South Bend, Indiana, and approximately 80 per cent to its stores in Illinois. During each of the fiscal years ending January 31, 1950 and 1951, merchandise having a sales value of over 30 million dollars was shipped to Goldblatt stores from this Wentworth Warehouse.

b. The goods handled at this warehouse are the "soft lines" and items of small bulk, including such merchandise as textiles, wearing apparel, furs, jewelry, small appliances, cameras and photographic equipment, sporting goods, chinaware and glassware, cigarettes and tobaccos, automobile supplies and tires, toys, lamps, pictures, mirrors, stationery, paper products, typewriters, bedding, shoes, rubbers, and drugs.

42 c. Goldblatt employs approximately 150 persons at the Wentworth Warehouse in the receiving, unloading, checking, unpacking, storing, handling, assembling, re-

packing, transporting to "store runs," distributing, and shipping of merchandise to Goldblatt's department stores.

6.

At the receiving platform and railroad siding of the Wentworth Warehouse, described in paragraph 4(b) hereof, Goldblatt employees daily receive, unload, and check incoming goods, 70 per cent of which goods is received in interstate commerce from points without the State of Illinois. The receiving department employees deposit these goods on the receiving platform and on freight elevators adjacent to and opening onto the railroad siding. Shipments from 50 to 60 trucks and trailers are daily received and unloaded at the receiving platform. An average of four freight cars are received each week on the railroad siding and goods therefrom unloaded onto the freight elevators. Goldblatt's receiving clerk makes up the upper half of the "receival" or "receiving memo", a copy of which is attached hereto, marked Exhibit 3, incorporated herein, and made a part hereof. After unloading, the "break-bulk" shipments are taken directly to the shipping platform by receiving department employees for immediate forwarding to a particular Goldblatt store; "break-bulk" shipments are composed of incoming goods which are designated on the common carrier freight bills for particular Goldblatt stores. A blanket receival is made up for "break-bulk" shipments for purposes of transmission through the warehouse. This blanket receival is immediately voided and interstore transfers made up by the receiving clerk for each of the stores for which the goods are designated. "Break-bulk" shipments are received daily. A "receival" for these goods is made up by the receiving clerk at the particular Goldblatt store when the goods are received
43 at that store. All other goods, after being unloaded, are moved to the various stock departments located in the basements and on all floors of the 3-story and 7-story buildings. In each stock department the goods are unpacked, counted, checked, marked, and placed in stock. Here the lower half of the "receival" is completed. Orders for all Goldblatt stores are filled from said stock departments.

7.

a. The normal procedure followed at the Wentworth Warehouse by Goldblatt employees in filling orders from

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stock is as follows: Merchandise is picked from stock as required by the particular Goldblatt store order and placed in a bin. This order is then checked and packed in a container, such as a box, carton, case, basket, or hamper, or the order is placed on a rack. The order is then placed upon a skid, often with other orders, and taken to the door of the freight elevator. The Goldblatt freight elevator operator transports the orders to the first floor. Here the orders are sorted and checked by store. Then the orders for each store are taken to the "store run" located on the shipping platform, described in paragraph 4(d) hereof. Goods are loaded from the "store run" onto Goldblatt's trucks and trailers. An average of 75 Goldblatt trailers are loaded weekly at the shipping platform, and of this number approximately 15 trailers a week go to Goldblatt's Indiana department stores. Throughout the day as goods are loaded, they are replaced in the store runs by other goods. A trip sheet is made up for each load; a copy of said trip sheet is attached hereto, marked Exhibit 4, incorporated herein, and
44 made a part hereof. Thereafter the goods are daily transported to Goldblatt's stores, including the stores in Hammond, Gary, and South Bend, Indiana. Orders not completely picked or packed by quitting time are left in that incompleted state in their respective stock departments until the next working day. Similarly, assembled goods are left in the store runs until the next working day. Trucks or trailers which are loaded and sealed, partially loaded, or empty also remain in the warehouse until the next working day.

b. The procedure followed by Goldblatt employees in filling orders in the tobacco department (located in the north room of the basement of the 7-story building) varies from that described in paragraph 7(a) hereof. The tobacco department is kept under lock and key during nonworking hours. All orders for cigarettes, tobacco, and smoking accessories for Goldblatt stores are filled from this room. The procedure followed in preparing an order for cigarettes is as follows: Cases of cigarettes are opened and the cartons are removed. The cartons are then placed in a machine used for stamping each package with Illinois or Indiana State tax stamps. The machine slits open the carton, prints the State tax stamp on the end of each cigarette package, and reseals the carton. The cartons are then repacked into the case. Copies of the orders from the particular retail store are then attached to the cases. The cases are then

placed in an elevator and taken directly to the first floor. Thereafter the cigarettes are handled as "valuable goods" in the manner described in paragraph 7(c) hereof.

c. A special procedure is employed in moving an
45 order of so called "valuable" goods from the respective departments to the shipping department. "Valuable" goods are goods particularly susceptible to theft, such as cigarettes, furs, jewelry, guns, nylon hosiery, and like items. The special procedure is as follows:

In the gun department, the Ronson lighter department, and the fur department, the stockman of each of the said departments delivers the "valuable" goods ready for shipment to defendant's shipping platform guard in holding space opposite the shipping office on the shipping platform. Defendant's shipping platform guard watches the goods at all times while they are on the platform and during the loading process until the trailer is locked and sealed. In the sporting goods, camera, and silverware departments, respectively, the stockman delivers the goods ready for shipment to the elevator man, who, in turn, delivers them to the checker on the first floor; then the checker delivers the goods to the defendant's platform guard in the holding space opposite the shipping office on the shipping platform. In the costume jewelry department, the stockman calls the receiving department, and this department sends an elevator man who picks up the shipment and delivers it directly to defendant's shipping platform guard in the holding space opposite the shipping office on the shipping platform. Goods from the sporting goods, silverware and costume jewelry departments are watched by the defendant's shipping platform guard at all times while the goods are on the platform and during the loading process until the trailer is locked and sealed. In the cigarette department, when orders are ready for shipment, the number
46 one copy of the invoice is delivered to the supervisor of shipping. When the supervisor is ready to load the trailer which is to receive the shipment, the supervisor sends the elevator man to pick up the shipment and defendant's shipping platform guard is notified. The shipping guard meets the shipment on the platform and guards it while it is being loaded and the trailer locked and sealed. In the hosiery department orders are ticketed with a blue ticket. When a blue ticketed order reaches the first floor, it is delivered immediately to the front door of the store run

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for the Goldblatt store for which it is intended, and the defendant's shipping platform guard is notified. In the case of hosiery and all other blue-ticketed orders, the defendant's shipping platform guard meets the shipment on the shipping platform and guards it at all times until it is loaded onto the trailer and the trailer locked and sealed. In the case of furs belonging to customers which are received for storage and repair by Goldblatt's stores, other than the State Street Store, the furs are delivered to the shipping platform of the Wentworth Warehouse in sealed trailers. Defendant's shipping platform guard goes to the trailer upon its arrival and examines the seals to make sure that they are intact before the seals are broken. He guards the shipment of furs from the time the seals are broken and the trailer opened until the furs are loaded onto another trailer for the State Street Store and until that trailer is locked and sealed. In the case of all valuable goods shipped from the Wentworth Warehouse, defendant's shipping platform guard prepares a shipment memorandum listing the nature of the goods being shipped, the department number, number of pieces, bill number, trailer number and seal number. The said shipping platform guard then transmits the shipment memorandum by telephone to the defendant's front door guard. The front door guard in turn then transmits the information in the shipment memorandum to defend-
47 ant's guard or special service man stationed at the Goldblatt store to which the goods are being shipped. Valuable goods shipments to Goldblatt's Indiana Stores are daily handled in the foregoing manner.

d. Some shipments from Goldblatt stores, including the Indiana stores, are received, unloaded, and checked at the shipping platform. These include (1) so-called "returned goods" which are goods being returned from the stores to the warehouse, (2) "interstore transfers" which are goods being transferred from one store to another via the warehouse, and (3) baled waste paper. The bales of waste paper are picked up daily from the shipping platform by the trucks of the Pioneer Paper Stock Company or the Thomas Paper Stock Company. Thereafter the waste paper is manufactured into paper products, substantial portions of which are shipped in interstate commerce.

8.

a. Defendant employs four day guards and four night watchmen to guard the Wentworth Warehouse against fire, theft, or other casualty or damage of Goldblatt's physical property or goods. The duties of defendant's employees are as follows:

b. One day guard is employed by defendant as the receiving department guard. The first thing in the morning this guard unlocks the fire doors on all floors; unlocks the 12 steel doors in the shipping department and the 9 receiving doors on the truck and trailer receiving platform. He guards the entire receiving department and receiving platform described in paragraphs 4(b) and 6 hereof. He enforces the "No Smoking" regulation. He excludes unauthorized persons or persons other than the unloaders and checkers from the receiving department and platform. He is required to guard the goods throughout the receiving, unloading, and checking process. He locks the receiving doors during his lunch period and then un-
48 locks the doors after his lunch period. He locks the receiving platform doors at the end of the Goldblatt working day. He also relieves the defendant's shipping department guard for lunch.

The receiving department guard performs the foregoing activities from 7 a. m. to 5 p. m., Monday through Friday, with half an hour for lunch. He is paid $40.00 a week for this work. He is also employed from 7 a. m. to 5 p. m. on every third Saturday at the 63rd Street Warehouse described in paragraphs 19 through 23, inclusive, hereof. He is compensated at a straight hourly rate for his work. He is paid no additional compensation as overtime for hours worked in excess of 40 per week.

c. A second day guard of the defendant is employed in the shipping department of the Wentworth Warehouse described in paragraphs 4(d) and 7 hereof. He is required to guard the entire 1-story building. It is his duty to guard the 12 steel doors in the shipping department to see that unauthorized persons do not enter or leave the warehouse through these doors. He watches the goods in the "store runs." He guards the Goldblatt trailers and trucks as they are being loaded to see that no goods are stolen; this involves watching the loading of many vehicles at the same time at different points along the shipping and loading platform. As each load is completed the truck and

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trailer are locked and sealed by Goldblatt employees. Defendant's shipping department guard then checks the locks and seals on the side and rear before he permits the vehicle to depart. This guard controls the departure of all vehicles at the shipping platform. He is under a duty to see that no trucks depart until the locks and seals are in good order. This guard's duties with respect to the handling of "valuable goods" are described in paragraph 7(c) hereof.

49 It is also the duty of defendant's shipping department guard to admit to the shipping platform all incoming trucks and trailers including those carrying shipments as described in paragraph 7(d) hereof. This guard examines the seals on both the side and rear of all incoming Goldblatt trucks and trailers to see that they are intact. If a seal is not in order, this guard telephones the defendant's detective or special service man at the place of origin, including the Indiana store. This guard is charged with enforcing the "No Smoking" regulation. This guard is also charged with seeing that the 12 steel doors are locked.

Defendant's shipping department guard works from 8:00 a. m. to 5. p. m., Monday through Friday, and from 7 a. m. to 5 p. m. every other Saturday, with half an hour for lunch. He is paid $55 each week. No additional compensation as overtime is paid to him by defendant for hours worked each workweek in excess of 40.

d. A third day guard of defendant is stationed at the "front door" of the Wentworth Warehouse described in paragraph 4(c) hereof. All Goldblatt employees enter and leave by this front door. The defendant's front door guard admits the United States mailman three times a day to deliver mail to the Goldblatt mail clerk at the Wentworth Warehouse.

The defendant's front door guard checks all packages being carried out the front door. When a Goldblatt trailer or truck leaves the Wentworth Warehouse for a Goldblatt store too late to arrive before closing time, the front door guard relays this information by telephone to defendant's switchboard operator in defendant's central office at 343 South Dearborn Street, Chicago, Illinois. The switchboard operator telephones the defendant's detective or special service man at the Goldblatt store involved and notifies him that the trailer will arrive late and is to be received.

50 When it is necessary for persons either to remain in or enter the Wentworth Warehouse after the Gold-

blatt regular closing time, the defendant's front door guard is notified by defendant's central office. The front door guard then enters this information on the Watchman's Log for the use of defendant's night watchmen, identifying the persons who are to remain or enter the warehouse, and the approximate time thereof. A sample Watchman's Log used by all defendant's guards and watchmen is attached hereto, marked Exhibit 5, incorporated herein, and made a part hereof. At the close of business, the defendant's front door guard turns over his station to a 2-man crew of defendant's night watchmen.

The defendant's front door guard is employed from 7 a. m. to 5 p. m., Monday through Friday, and every other Saturday, with a half hour for lunch. He is paid by defendant a straight weekly salary of $49.00 with no additional compensation as overtime for hours worked each workweek in excess of 40.

e. A fourth day guard of defendant is employed as the head house detective at the Wentworth Warehouse. He is in charge of all defendant's day guards at this warehouse. He is responsible for protecting during the day the buildings composing the Wentworth Warehouse, the merchandise therein, and the operations carried on within this warehouse. He patrols the entire warehouse, guarding against fire and theft and other hazards. He is required to remove the time tape for the previous night from the time lock on the front door, described in paragraph 4(c) hereof. He examines the time tapes and checks them against the entries in the night watchman's log to see that no unauthorized openings of the front door were made. The head house detective must also make certain that the time lock on the front door is set and in operating order at the warehouse closing time. He checks the time clock tapes to see that the night watchmen have made all
51 proper stations during the night. He is responsible for preserving the tapes for inspection by the Cook County Inspection Bureau. The Cook County Inspection Bureau approves or disapproves the security measures taken by insurance policyholders. Upon the basis of its findings the Cook County Inspection Bureau determines whether the policyholders shall be permitted to continue their insurance, whether premium discounts shall be allowed, or whether additional premiums shall be charged.

He has charge of the supply of seals used by the entire

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Goldblatt system to seal trucks and trailers. He regularly supplies seals to each of the various stores and warehouses for their use. He keeps a record of the seals. He also requisitions a new supply of seals when required.

The head house detective also apprehends dishonest employees or strangers. He makes a record and report of any arrests or incidents to defendant's central office on forms, copies of which are attached hereto, marked Exhibits 6, 7, 8, and 9, incorporated herein, and made a part hereof. In addition he prepares a monthly report of stolen goods recovered and restitution paid in connection with thefts.

The head house detective relieves the receiving department guard when the latter relieves the shipping department guard. He relieves any of the day guards whenever occasion requires. When working as a relief guard he performs the same work performed by the guard relieved. The head house detective prepares the records of hours worked daily and salary rate for all defendant's day guards and night watchmen working at the Wentworth Warehouse. These time sheets are submitted weekly to the defendant's main office where the records are completed. The head house detective is responsible for turning over to the night watchmen the protection of the warehouse.

The head house detective works from 8 a. m. to 5:15 p. m., Monday through Friday, and approximately two Saturdays out of every three. He is allowed an hour for lunch. He is paid a straight salary of $60 per week
52 with no additional compensation as overtime for hours worked each workweek in excess of 40.

9.

a. There are two 2-man crews of night watchmen employed by defendant at the Wentworth Warehouse. The first crew works the early shift and the other crew works the late shift. The crews alternate shifts weekly, working the following schedule:

Shift	Watchman	Sun.	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat
1	A	7 a. m. to 1 p. m.	5 p. m. to	5 p. m. to	5 p. m. to	Off	5 p. m. to	5 p. m.
	B	1 p. m. to 7 p. m.	12 M.	12 M.	12 M.		12 M.	a. m. 8
2		7 p. m. to 7 a. m. Mon.	12 M to 7 a. m. Tues.	12 M. to 7 a. m. Wed.	12 M to 7 a. m. Thurs.	5 p. m. to 7 a. m. Fri.	12 M. to 7 a. m. Sat.	Off

b. The 2-man crew of night watchmen take over from the defendant's front door guard at the front door. They receive oral instructions including the location of railroad freight cars on the warehouse railroad track. They read the Watchman's Log on which will be noted authorized special openings and special instructions. After all Goldblatt employees have been checked out the night watchmen lock the front door. The door is equipped with a time lock and every opening of the door is recorded on a tape. All openings must be authorized and must be explained on the Watchman's Log. No emergency opening may be made unless authorized by defendant's central office. If an emergency arises, that authorization may be obtained by telephone. Between 5 and 6:15 p. m. both
53 night watchmen check all of the receiving and shipping doors, fire doors, fire escape doors, and windows to see that they are properly locked.

c. Beginning at 6:15 p.m., the defendant's night watchmen alternate in making hourly rounds of 20 key stations located as follows:

Station No.	Floor	Station No.	Floor	Station No.	Floor
1	Front Door	8	4th Southwest	15	2d Northeast
2	7th Northeast	9	(Hosiery Sec. (4th North	16	1st Northeast
3	7th Southwest	10	3d Northeast	17	1st—Receiving Office
4	6th Southwest	11	(3d Lamp Dept. (Adm. Bldg.	18	1st—Shipping Dept. Southwest
5	6th Northeast	12	3d Southwest	19	Basement—Boiler Room at Tobacco Dept.
6	5th Northeast	13	2d Southwest		
7	5th Southwest	14	2d Adm. Bldg.	20	Front Door

These stations are so located as to require the night watchmen to cover the entire Wentworth Warehouse, guarding all goods in various stages of receiving and preparation for shipment and all doors and windows and other possible means of entry into the warehouse. The

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first round starts at station 1 at the front door where one watchman takes the key and turns it in the keyhole. This records the time on a tape contained in a clock in the lobby. An indicator on the key records an additional number each time the key is turned. The watchmen then go to the elevator opening into the Administration building and the 7-story building and ride to the seventh floor. The watchman carrying the key gets off the elevator at the seventh floor. The second watchman returns the elevator to the second floor and takes his post near the Fashions Department
54 where he watches the fire escape door and the windows over the freight cars. The watchman on the seventh floor walks north in the center aisle past various warehouse sections to station No. 2 in the northeast corner. He then retraces his steps, going south the full length of the building and to station No. 3 at the southwest corner of the seventh floor. He then descends to the sixth floor to station No. 4 in the southwest part of the building directly under station No. 3. He proceeds to the other stations in a similar manner. As he patrols the entire building he examines all doors and windows to see that they are secure, that no fire escape doors are blocked open, that the night lights are on, and that other lights are off. He also passes all departments and guards the goods that are warehoused and being prepared for shipment. When he leaves station No. 16, which is on the receiving platform on the first floor of the northeast corner of the 7-story building, he passes the 22 receiving doors and checks them to see that they are closed and locked. In the shipping department he observes the goods in store runs in readiness for loading. He also observes the conditions of the partially loaded trailers or trucks and any trailers or trucks that may be locked or sealed. He is also charged with observing the 12 steel doors in the shipping department to see that they remain closed and locked. Station 18, at the west wall in the south end of the shipping department, is near a valve closet. The valve closet houses a valve connected with the automatic sprinkler system. One of the duties of the watchman is to watch that the sprinkler system does not start sprinkling and cause water damage when there is no fire. In case of fire the
54 watchman would call the City Fire Department. A fire alarm box signal for the Chicago Fire Department is located on every other floor. At the same time, he would also utilize the fire extinguisher. At station 19 in the boiler room he checks to see that the tobacco department door is

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properly locked. He then returns upstairs to his final station, No. 20, at the "front door." A round consumes from 30 to 45 minutes. This watchman remains at his station at the "front door" until time for the next round. During the period that he is at the "front door" he controls the ingress and egress of all persons to or from the building. He cannot permit any employee or other person to leave or enter the building without specific authorization entered on the Watchman's Log. Entrance by authorized persons may be made only by the use of two keys. One is used for the time lock and one is used for the door lock. If any emergency arises requiring the opening of the door, not previously authorized, the watchman is required to telephone defendant's night supervisor of watchmen for authorization. The Goldblatt mailman regularly picks up the interstore mail at about 7 p.m. This opening of the door is an authorized special opening.

d. The second watchman is stationed in the north section of the second floor of the 7-story warehouse outside the Fashions Department (women's coats). He is armed with a shotgun. His special responsibility is to guard against entering through windows in the east wall accessible from the tops of railroad freight cars on the railroad siding. He is notified at the beginning of his shift of
56 the position of all railroad freight cars on the railroad siding. In the past, thieves used the freight cars to obtain entrance through the windows and have taken valuable goods from the Fashions Department. Because of the danger of breaking in through these windows, the watchman looks out a nearby window to detect prowlers on or around the railroad cars or in the street below. He investigates noises or commotions outside the warehouse, but does not leave the building. He calls the City Police if he detects any prowlers around the warehouse or freight cars. Once an hour the night watchman stationed at the "front door" signals the second floor guard to start his round. Both men meet at the "front door" and the second floor watchman takes the clock key and inserts it in key station No. 1 at the front door. The men then proceed by way of the elevator to the seventh floor.

e. The defendant's night watchmen are paid at a straight hourly rate with no additional overtime compensation for the hours regularly worked in excess of 40.

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10.

Ashland Warehouse and Garage.

a. Goldblatt maintains a warehouse and garage at 3161 South Ashland Avenue, Chicago, Illinois, hereinafter called the "Ashland Warehouse" and "Ashland Garage" respectively. The said structure has a frontage on Ashland Avenue of 630 feet and extends in depth 455 feet east. A blueprint of the first floor of the structure is attached hereto, marked Exhibit 10, incorporated herein, and made
57 a part hereof. The northerly 320 feet of the structure constitutes the Ashland Warehouse.

b. The Ashland Warehouse consists of three interconnected buildings. One building is the dock building which fronts on Ashland Avenue and extends east approximately 180 feet. The second building is a 2-story building having a common wall with the dock building and extending east approximately 210 feet. The third building is a train shed having a common wall with the 2-story building and extending east approximately 65 feet.

c. In the train shed, at the northern end, is a truck receiving platform where goods brought into the Ashland Warehouse by truck and trailer are received. In the east wall are six receiving doors through which the goods are brought to the truck receiving platform. In the south wall of the train shed is a large electrically operated steel door; through this doorway a double railroad track with a capacity of 10 freight cars extends north into the train shed about 250 feet. This double railroad track is flanked on both sides by a railroad receiving platform. Three large fire doors connect with the 2-story building.

d. The 2-story building is used for warehousing of goods brought into the Ashland Warehouse. It also contains Goldblatt's office which handles paper work in connection with the goods warehoused in the Ashland Warehouse and Garage. In this building are three freight elevators; one opens into the train shed and the 2-story building and two elevators open into the dock building.
58 Three large fire doors connect with the dock building.

e. The east half of the dock building is used for the warehousing of goods. The west half of the building is the shipping department for the Ashland Warehouse and Garage. A truck pit at street level, 60 feet wide and 310 feet long, extends along the west wall of the building. Trucks and trailers enter and leave the truck pit through

electrically controlled doors, one door in the west end of the north wall, one door at the north end, and one at the south end of the west wall, facing Ashland Avenue. The south door is the one most frequently used by trucks and trailers. Adjacent to the south door is the guard's booth where the electrical control of the door is located. A pedestrian door is located directly south of the guard's booth. During the Goldblatt working day this pedestrian door is used by all Goldblatt employees or other persons entering or leaving the dock building. At all other times, this door is used by all warehouse employees entering or leaving the entire Ashland Warehouse. A loading and shipping platform approximately 3½ feet above the truck pit and at truck bed level extends the full length of the pit. Behind the loading and shipping platform are "store runs" which occupy the north third of the shipping platform and "delivery runs" which occupy the south two-thirds of the platform and an "O" run between them. In the "store runs" are goods assembled for shipment to a particular store. In the "delivery runs" are goods assembled for shipment to customers of Goldblatt's stores; each run covers a particular area. There is a special run designated as the "O" run, which is the run used for Goldblatt's Hammond, and Gary, Indiana delivery base; the latter delivery base
59 is the distribution center for the delivery of goods to Goldblatt customers located within 30 miles of Hammond, and Gary, Indiana, and in Illinois, south of 115th Street in Chicago and east of U. S. Route 45. These runs are about 10 feet wide and 40 feet long. Behind the store, "O," and delivery runs, and in the middle of the building, is the shipping office.

11.

a. The Ashland Garage has a frontage on Ashland Avenue of about 300 feet and a depth of 375 feet. It consists of five interconnected buildings, namely, the garage warehouse building, the west loading building, the east loading building, the garage shop, and the office building. See Exhibit 10 hereof.

b. The garage warehousing building is a 1-story structure about 120 feet wide, facing on Ashland Avenue and extending east about 230 feet; it has common walls with the garage shop and west loading building. It is used for the warehousing of heavy and bulky items, such as stoves,

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refrigerators, and washing machines. Incoming goods to be warehoused in the garage warehousing building are delivered directly into this building for receiving, unloading, and checking. Trucks and trailers carrying such incoming goods enter from Ashland Avenue through the electrically controlled garage door located at the southwest corner of the building. Goods picked up from the garage warehousing building for shipment to Goldblatt's stores are transported by lift truck through either of the two doors in the garage warehousing building, through the
60 electrically controlled garage door in the west loading building, and to the shipping platform in the dock building described in paragraph 10(e) hereof. The control for the electrically controlled door described above is located in the guard's booth, adjacent to said door.

The east and west loading buildings cover the north 145 feet of the Ashland Garage. It has a common wall on the north with the dock building and the 2-story building, and a common wall on the south with the garage warehousing building and the garage shop. It houses the equipment used in the sorting and loading of packages which have already been sold to customers by all Goldblatt stores, except South Bend, and Joliet, for delivery in Chicago north of 115th Street. Interstore mail is also sorted here.

c. The garage shop covers a space 144 feet by 120 feet. It has common walls with the garage warehousing building and the east loading building. It is used for the repairing, rebuilding, and maintaining of the Goldblatt motor transportation fleet and contains all the essential equipment for such work.

d. In the office building located west of the west loading building is located the office of Goldblatt's superintendent for the Ashland Garage, including the package distribution service.

12.

a. Approximately 65 per cent of the goods received at the Ashland Warehouse and Garage is regularly and daily received in interstate commerce from points outside of the State of Illinois. Merchandise having a sales value of over
12½ million dollars was received at the Ashland Ware-
61 house and Garage during each of the fiscal years ending January 31, 1950 and 1951. Approximately 20 per cent of the merchandise shipped from the Ashland Warehouse and Garage is regularly and daily shipped to Gold-

blatt's stores or customers in Hammond, Gary, and South Bend, Indiana, and approximately 80 per cent to its stores and customers in Illinois. During each of the fiscal years ending January 31, 1950 and 1951 merchandise having a sales value of over 12½ million dollars was shipped to Goldblatt stores or to customers of Goldblatt stores from the Ashland Warehouse and Garage.

b. The goods handled at the Ashland Warehouse and Garage are characterized as "hard lines" or "bulk merchandise." These goods include rugs, carpets, linoleum, springs and mattresses, refrigerators, sewing machines, radio and television sets, electric and gas ranges, washing machines, and furniture of almost every description including unfinished furniture, upholstered furniture, metal furniture, studio couches, and folding beds.

c. Goldblatt employs approximately 150 persons at the Ashland Warehouse and Garage in the receiving, unloading, checking, unpacking, storing, handling, assembling, repacking for delivery, servicing, transporting to store, "O," and delivery runs, distributing, and shipping of merchandise to Goldblatt's department stores and customers thereof.

13.

At the truck and railroad receiving platforms of the Ashland Warehouse, described in paragraph 10(c) hereof, and in the garage warehouse building in the Ashland
62 Garage, described in paragraph 11(b) hereof, Goldblatt employees are engaged daily in receiving, unloading, and checking incoming goods, and depositing them on the platforms or floor of the garage warehouse building. Approximately 65 per cent of these goods is received in interstate commerce from points without the State of Illinois. Fifty to 60 trucks and trailers are daily received and goods therefrom unloaded and checked at the truck receiving platform and in the garage warehouse building. An average of 8 freight cars a week are received and goods therefrom unloaded and checked at the railroad receiving platforms. Shrubs, plants, fertilizer, and garden goods received during the early spring are stored under a large canvas or tent in the outdoor space in the rear of the east loading building adjacent to the railroad tracks. Goldblatt's receiving clerk makes up the upper half of the "receival." See Exhibit 3. The incoming goods after

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being unloaded and checked are moved by use of lift trucks to various places of storage in the train shed, in the 2-story building, in the east portion of the dock building, and in the garage warehouse building. In each stock department the goods are unpacked, counted, checked, marked, and placed in stock. Here the lower half of the "receival" is completed. Orders for all Goldblatt stores are filled from said stock departments.

14.

a. On the first floor of the 2-story building in the Ashland Warehouse, described in paragraphs 10(b) and 10(d) hereof, Goldblatt maintains a furniture renovating shop.
In this shop Goldblatt employs approximately 30 em-
63 ployees who perform every character of job in reconditioning, upholstering, repairing, replacing broken parts, assembling, refinishing, and polishing furniture. This includes furniture which has been damaged while on display in the stores or damaged in transit. Here all furniture to be shipped from the Ashland Warehouse is uncrated, examined, repaired, or refinished, as necessary, and polished before delivery is made to customers of Goldblatt's department stores.

b. On the second floor of the 2-story building in the Ashland Warehouse, Goldblatt employs 50 employees in the Radio and Television Clinic. These employees remove television and radio sets from their cases. They also repair new, display and customers' sets. These employees perform the foregoing functions for all Goldblatt's stores and customers thereof. On the second floor of this building Goldblatt employs 12 employees in the Carpet and Linoleum Department. Here carpets and linoleum are cut to size. Carpeting is serged or edged and bound. Carpets and linoleum are prepared for laying. This work is performed for all Goldblatt's stores and customers thereof.

c. In the basement of the 2-story building in the Ashland Warehouse, Goldblatt employs four employees who unpack sewing machines, sewing machine accessories, and cabinets. Accessories are attached to the sewing machines and the sewing machines are tested. The sewing machines are then installed in cabinets or portable cases.

64 15.

a. The normal procedure followed at the Ashland Warehouse and Garage by Goldblatt employees in filling

orders from stock is as follows: Merchandise is picked from stock as required by the particular order. The picking of the order is usually done by lift trucks. Thereafter, the goods are hauled to the appropriate store run, "O" run, or delivery run behind the shipping and loading platform in the dock building, described in paragraph 10(e) hereof. Wood and upholstered furniture must first be taken to the furniture renovating shop for inspection, polishing, and repair if required, before being delivered to the run. Goods are loaded from the runs onto Goldblatt trucks and trailers. Throughout the day as goods for delivery to customers are loaded onto trucks they are replaced in the runs by other goods for later delivery. A trip sheet is made up for each truck load. See Exhibit 4. The trucks and trailers are then locked by Goldblatt employees. The trailers are also sealed, side and rear, and the seal number noted by defendant's day guard stationed at the shipping department. Thereafter the goods are transported either to Goldblatt's stores, including the three Indiana stores, or to customers of Goldblatt stores, some goods being transported via the Hammond and Gary base, described in paragraph 10(e) hereof. Between 15 and 25 trailers are shipped to Indiana weekly. Goods assembled in the store runs, "O" run, or delivery runs, which have not been loaded onto trucks and trailers by quitting time remain in the runs until the next working day. Similarly, trucks or trailers which are loaded and sealed, or partially loaded, or empty, remain in the warehouse until the next working day.

65 b. Sealed shipments are daily received at the shipping platform in the dock building from Goldblatt's stores. These include (1) "returned goods," (2) "interstore transfers," and (3) "customer goods," such as used washing machines turned in as a credit on the purchase of a new machine. Such shipments are daily received from Goldblatt's Indiana stores.

c. The normal procedure followed by Goldblatt employees for the handling of packages sold by all Goldblatt stores, except South Bend, Indiana, and Joliet, Illinois, described in paragraph 11(b) hereof, is as follows: The packages are delivered by trailer from the aforesaid Goldblatt stores. The trucks enter from Ashland Avenue through the electrically controlled garage door located at the southwest corner of the west loading building and proceed to the package platform near this door. At least one

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trailer a day is received from Indiana at the package platform. At least one trailer a day leaves the package platform for Indiana. The packages are sorted by means of a conveyor belt. Interstore mail is also sorted in this unit and thereafter distributed to the various Goldblatt establishments.

16.

In the garage shop, described in paragraph 11(c) hereof, Goldblatt employs seven mechanics, one washer, and one tire changer in the repairing, rebuilding, and maintaining of Goldblatt's entire motor transportation
66 fleet. This fleet consists of 129 trucks, 17 tractors, and 70 trailers. The shop is equipped to perform all mechanical repair and maintenance work, including the installation of new motors and other parts.

17.

a. Defendant employs 2 day guards at the Ashland Warehouse and from four to six night watchmen to guard the Ashland Warehouse and Garage against fire, theft, or other casualty or damage. The duties of defendant's employees are as follows:

b. One day guard employed by defendant is stationed at the truck and railroad receiving platforms described in paragraphs 10(c) and 13 hereof. In the morning, the first thing this guard does is unlock the six truck receiving doors. He guards both the truck and railroad receiving platforms. He enforces the "No Smoking" regulations. He checks the fire doors to see that they are not blocked and will operate. He excludes unauthorized persons or persons other than the unloaders and checkers from the receiving platforms. He is required to guard the goods throughout the receiving, unloading, and checking process. He locks the six truck receiving doors during his lunch period and then unlocks the doors after his lunch period. The day guard on duty locks the truck receiving doors at the end of the Goldblatt working day.

67 c. A second day guard employed by defendant is stationed in the guard booth near the southwest corner of the truck pit in the shipping department of the dock building described in paragraphs 10(e) and 15(a) and 15(b) hereof. It is his duty to guard and operate the electrically controlled doors. He opens the doors to admit

either trucks or trailers to the shipping platform or to permit their egress. It is his duty to guard the entire shipping department, including the store, "O," and delivery runs. He guards the Goldblatt trailers and trucks as they are being loaded to see that no goods are stolen; this involves watching the loading of many vehicles at the same time at different points along the shipping and loading platform. As each trailer load is completed, the trailer is locked by the defendant's guard. This guard affixes metal seals on the trailer, side and rear. He records the numbers of the seals, the trailer number, the time of departure, and the destination of shipment of the outgoing trailer. Between three and five trailers leave the shipping platform daily for Indiana.

All trailers belonging to Goldblatt's entering the shipping department in the dock building are sealed, side and rear. The defendant's guard checks the incoming Goldblatt trailers, removes the seals from the rear and side doors, records the seal number, the trailer number, time of arrival, point of origin, and whether trailer carried a shipment. An average of three to five trailers are received each day from Indiana. This guard makes
68 and receives telephone calls with regard to shipments to and from all Goldblatt stores. He makes a record of such calls in a log book. Trailers that are sealed and contain goods are frequently received for overnight storage. This day guard also receives and sorts the interoffice mail and U. S. mail for the Ashland Warehouse and Garage.

d. Until February 1, 1951, a third day guard employed by the defendant was stationed in the guard's booth at the southwest corner of the west loading building. The guard's booth is directly adjacent to the electrically controlled garage door, described in paragraphs 11(b) and 15(c) hereof. The guard's booth contains the electric switch for opening and closing the garage door. This guard opened this garage door to admit or permit the passage of every vehicle passing in or out of the building. Goods picked from the stock in the garage warehousing building for shipment are transported by lift truck through this door to the shipping platform in the dock building. All incoming goods received in the garage warehousing building, as described in paragraph 11(b) hereof, are also admitted through this door. This day guard was required to record the time of entry of all incoming Goldblatt trailers ad-

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mitted through this garage door; he also broke the seals on the trailers if the trailers were to be unloaded. The guard was also required to seal, front and side, all Goldblatt trailers leaving the Ashland Garage during his shift, to make a record of the seal numbers, the time of departure, and the destination of the trailer. This guard also enforced the "No Smoking" regulations. At the end of a half day's work this day guard exchanged posts with the day guard stationed at the receiving platform, as described in paragraph 17(b) hereof. Since February 1, 1951, the duties of this guard have been performed by a Goldblatt employee.

69 e. Until January 1, 1949, a fourth day guard was employed by defendant as the head house detective at the Ashland Warehouse and Garage. He was in charge of all defendant's day guards at this warehouse. He was responsible for protecting, during the day, the building composing the Ashland Warehouse and Garage, the merchandise therein, and the operations carried on therein. He patroled the entire premises, guarding against fire, theft, and other hazards. He removed the clock disks from the key clocks carried by the defendant's night watchmen and inserted fresh disks. He checked the clock disks to see that the defendant's night watchmen had made their proper rounds and checked the Watchman's Log kept by the night men. A clock disk is attached hereto, marked Exhibit 11, incorporated herein, and made a part hereof. He preserved the clock disks for examination by the Cook County Insurance Inspection Bureau, described in paragraph 8(e) hereof.

The head house detective also apprehended dishonest employees or strangers. He made a record and report of any arrests or incidents to defendant's main office on forms, copies of which are attached hereto as Exhibits 6, 7, 8, and 9. In addition, he prepared a monthly report of stolen goods recovered. He relieved the other three day guards, described above, should occasion require.

Until January 1, 1949, the head house detective prepared the records of hours worked daily and salary rate for all defendant's day guards and night watchmen working at the Ashland Warehouse and Garage. Since Janu-

70 ary 1, 1949, this work has been performed by the day guard described in 17(c) hereof. These records are submitted weekly to the defendant's main office where the records are completed.

Until January 1, 1949, the head house detective was responsible for turning over to the night watchmen the protection of the warehouse. Since January 1, 1949, this responsibility is now that of the day guard described in paragraph 17(c) hereof.

f. Defendant's two day guards stationed in the Ashland Warehouse and Garage, described in paragraphs 17(b), (c) and (d) hereof, work from 7 a. m. to 5 p. m., Monday through Saturday, or a total of 60 hours weekly. They are paid by defendant straight weekly salaries and receive no additional compensation as overtime for hours worked in excess of 40.

18.

a. Defendant has a night watchman stationed in the guard's booth near the southwest corner of the truck pit in the shipping department of the dock building to protect the Ashland Warehouse between 5 p. m. and 7 a. m., Monday through Saturday, and 24 hours on Sunday and holidays. This is the same station manned by the day guard, described in paragraph 17(c) hereof. It is the night watchman's duty to admit all Goldblatt's trucks and trailers which are regularly received from all Goldblatt's establishments. These are admitted by him through the electrically controlled doors. He is required to check in all of the incoming trailers. He records the time of arrival of the trailer, the seal numbers, and any irregularity in the appearance of the seals, trailer numbers, point of origin, and whether the trailer is loaded or empty.

71 These trailers are admitted either for overnight storage or for loading or unloading at the shipping platform the next working day. It is also the night watchman's duty to check any pedestrian entering or leaving the Ashland Warehouse and Garage. He performs the foregoing activities from the time he comes on duty at 5 p. m. until the last trailer is checked in and driver checked out at about 9 p. m.

After the last driver is checked out the night watchman locks the guard's booth and the pedestrian door, and the power door. He then takes his key clock and begins his hourly rounds of 12 key stations located as follows:

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Station No.	Floor	Building	Station No.	Floor	Building
1	SW Cor.—2d	2-Story & Basement Building	7	NE Cor.—Basement	2-Story & Basement Building
2	NW " —2d	"	8	NW Cor.—Basement	"
3	NE " —2d	"	9	SE Cor.—Basement	"
4	SE " —2d	"	10	SW Cor.—Basement	"
5	S Wall	Train Shed west of rail entrance door	11	SE Cor.	Dock Building
6	NE Cor.	Train Shed	12	NW Cor.	"

These stations are so located as to require the night watchman to cover the entire Ashland Warehouse, guarding all goods that are in various stages of receipt, storage, and preparation for shipment, and all doors and other possible means of entry into the warehouse. The watchman's hourly tour begins and ends at the guard's booth. On his tour of duty he must check all fire escape doors and see
72 that these doors are padlocked on the inside. He also checks the fire doors to see that they are secure. He must take particular care to check the door leading to the roof in the men's washroom on the second floor of the 2-story building.

He guards against damage by leaks and overflows in the plumbing, the roof, and ventilators; in the event he discovers such threatened water damage, he notifies Goldblatt's engineer, stationed in the boiler room at the rear of the garage shop. He watches the goods in all the runs, as well as in partially loaded trailers, at the shipping platform. At the truck and railroad receiving platforms, he checks the six receiving doors and guards the railroad freight cars which may be loaded, partially loaded, or empty. During the night an average of eight freight cars a week are delivered and picked up at the train shed. It is the duty of the night watchman to open the electrically controlled steel door in the south end of the train shed and admit the railroad freight cars and crew. He records the time of arrival of the freight cars, the serial numbers of the cars, and the name of the railroad company; he turns this record over to defendant's day guard described in paragraph 17(c) in the Ashland Warehouse. The night watchman must remain on the railroad receiving platforms during the entire time the railroad crew is in the train shed. Before permitting the removal of empty freight cars, he inspects them to see that no goods are on board.

As soon as the railroad crew leaves, he closes and secures the door. His tour of duty takes him past the furniture renovating shop, the Radio and Television Clinic, the sewing machine department, and across the carpet and
73 linoleum department in paragraph 14(b) hereof. In case of fire, it is the duty of the night watchman to call the American District Telegraph by means of a fire alarm signal box located on each floor. At the same time he would utilize a fire extinguisher. Should the automatic sprinkler system start when there is no fire, the night watchman must shut off parts of the system to prevent damage.

b. Defendant has a night watchman stationed in the guard's booth at the southwest corner of the west loading building to protect the Ashland Garage between 5 p. m. and 9 a.m., Monday through Friday, and 24 hours on Saturday, Sunday, and holidays. From 5 p. m. to about 9:30 or 10 p. m., the basic responsibilities of this night watchman are the same as those of the day guard who manned this station until February 1, 1951, as described in paragraph 17(d) hereof; the night watchman performs these duties until the last truck or trailer is checked in and parked.

After the last truck has been parked, this night watchman locks the guard's booth, takes his key clock, and begins his hourly rounds of seven key stations located as follows:

Station No.	Location
1	Adjacent to guard's booth.
2	SW corner of garage warehouse building.
3	East wall of garage shop next to garage exit door.
4	NE corner of the east loading building.
5	North wall of the west loading building at package bridge.
6	In the men's washrooms on 2d floor of office building.
7	Same as No. 1.

74 These stations are so located as to require the night watchman to cover the entire Ashland Garage, guarding all goods in various stages of receipt, storage, and preparation for shipment; all trucks and trailers in the garage; and all doors and other possible means of entry

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into the warehouse. The watchman's hourly tour begins and ends at the guard's booth. On his tour of duty he must check all fire escape doors to see that those doors are padlocked on the inside. He also checks the fire doors to see that they are secure. He guards against damage by leaks and overflows in the plumbing, the roof, and ventilators; in the event he discovers such threatened water damage, he notifies Goldblatt's engineer, stationed in the boiler room at the rear of the garage shop. In case of fire, it is the duty of the night watchman to call the City Fire Department. At the same time he would utilize a fire extinguisher. Should the automatic sprinkler system start when there is no fire, the night watchman must shut off the system to prevent damage.

Between his hourly tours the night watchman is stationed in the guard's booth, and admits or checks out employees, trucks and trailers in the manner described above. He also checks in or out Goldblatt's road service mechanic who is stationed in the garage shop for emergency calls during the night. At about 5 a. m. the night watchman checks out Goldblatt's truck carrying advertising circulars to the Indiana stores.

c. For approximately three months during the late winter and early spring, defendant has a night watchman stationed in the rear of the east loading building between 5 p. m. and 7 a. m., Monday through Saturday, and 24 hours on Saturday, Sunday and holidays. This night watchman protects shrubs, plants, fertilizer, and garden goods stored under a large canvas or tent, described in paragraph 13 hereof. This watchman patrols the entire area in which the goods are stored, making clocked stations consecutively. It is his duty to guard the aforesaid goods against theft, wind, fire, and other hazards. He must guard particularly against possible theft by train crews engaged in delivering or picking up railroad freight cars at the train shed, or spotting such cars in the rear of the east loading building. This night watchman must also guard such railroad freight cars spotted on the outside of the train shed.

d. Defendant's night watchmen stationed inside the Ashland Warehouse and Garage, described in paragraphs 18(a) and (b) hereof, work the following schedule:

Shift	Sun.	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.
		Relief					
	7 a.m.	5 p.m.	5 p.m.	5 p.m.	5 p.m.	5 p.m.	9 p.m.
1	to	to	to	to	to	to	to
	7 p.m.	9 p.m.	12 M.	12 M.	12 M.	12 M.	7 a.m.
							Sun.
							Relief
	7 p.m.	9 p.m.	12 M.	12 M.	12 M.	12 M.	5 p.m.
2	to	to	to	to	to	to	to
	9 a.m.	9 a.m.	9 a.m.	9 a.m.	9 a.m.	9 a.m.	*9 p.m.
	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.	

* 24 hour watch service at garage on Saturday.

Defendant's night watchmen stationed outside the warehouse, described in paragraph 18(c) hereof, protecting the shrubs, plants, etc., work the following schedule:

76

Shift	Sun.	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.
			Off—Relief				
	8 a.m.	5 p.m.	5 p.m.5	5 p.m.	5 p.m.	5 p.m.	8 a.m.
1	to	to	to	to	to	to	to
	8 p.m.	12:30	12 M.9	12:30	12:30	12:30	8 p.m.
					Relief		
	8 p.m.	12:30	12 M.9	12:30	12 M.5	12:30	8 p.m.
2	to	to	to	to	to	to	to
	8 a.m.	8 a.m.	7 a.m.8	7 a.m.8	7 a.m.9	7 a.m.	8 a.m.

Only one night watchman mans a particular station during a shift. For each station there are two regular night watchmen and a relief night watchman. All of defendant's night watchmen are employed at a straight hourly rate of 90 cents for approximately a 50-hour week, and do not receive additional compensation as overtime for hours worked in excess of 40 per week.

19

63rd Street Warehouse.

a. Goldblatt maintains a warehouse at 201 East 63rd Street, Chicago, Illinois, hereinafter called the "63rd Street Warehouse." This warehouse is a 2-story and basement brick structure fronting on the south side of 63rd Street. The 63rd Street Warehouse is 400 feet wide and 200 feet deep. The warehouse contains 100,000 square feet of floor space. The second floor covers the front section of the building. A blueprint of the first floor of the 63rd Street Warehouse is attached hereto, marked Exhibit 12, incorporated herein, and made a part hereof.

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b. In the center of the west wall of the 63rd Street
77 Warehouse is an electrically operated steel door through which trucks and trailers enter and leave the truck pit. The truck pit is approximately 50 feet wide and extends east from the west wall into the warehouse approximately 110 feet. On the north side of the truck pit is a truck receiving platform where goods brought into the warehouse by truck and trailer are received. This truck receiving platform extends the length of the truck pit. At the east end of the truck pit and extending the width of the pit is a loading and shipping platform. Directly behind the loading and shipping platform are located the store runs.

c. Directly adjacent to the east wall of the 63rd Street Warehouse and running almost the entire length of the east wall is a railroad siding capable of accommodating five railroad cars. From freight cars on this railroad siding goods are unloaded, checked by Goldblatt's employees, and brought into the warehouse through three receiving doors located in the east wall and deposited on a railroad receiving platform just inside the east wall of the warehouse.

d. In the basement is housed the boiler room and building machinery.

e. Goods are warehoused throughout the building by departments and so arranged as to allow aisles and cross aisles to permit handling.

78 20.

a. Approximately 50 per cent of the incoming goods received at the 63rd Street Warehouse is regularly and daily received in interstate commerce from points outside of the State of Illinois. Merchandise having a sales value of over 10 million dollars was received at this warehouse during each of the fiscal years ending January 31, 1950 and 1951. Approximately 17 per cent of the goods shipped from this warehouse is regularly and daily shipped to Goldblatt's stores in Hammond, Gary, and South Bend, Indiana, and approximately 83 per cent to its stores in Illinois. During each of the fiscal years ending January 31, 1950 and 1951, merchandise having a sales value of over 10 million dollars was shipped to Goldblatt stores from the 63rd Street Warehouse.

b. The goods handled at this warehouse are groceries,

liquors, beer, candies, and cookies, as well as garden tools and pet shop supplies. During the 12-month period ending January 31, 1950, Goldblatt sold $17,207,154 worth of food products in all of its retail stores; of this amount, in excess of 10 million dollars represents food products which were handled and shipped from the 63rd Street Warehouse. Liquors and beer are not shipped to Indiana Stores.

c. Goldblatt employs approximately 26 persons at the 63rd Street Warehouse in the receiving, unloading, checking, unpacking, storing, handling, assembling, packaging, packing, transporting to store "runs," distributing, and shipping of goods to Goldblatt's stores.

79 21

At the truck and railroad receiving platforms of the 63rd Street Warehouse, described in paragraphs 19(b) and (c) hereof, Goldblatt's employees daily receive, unload, and check incoming goods, 50 per cent of which goods is received in interstate commerce from points without the State of Illinois. The employees deposit these goods on the truck and railroad receiving platforms. Shipments from 25 to 30 trucks and trailers are daily received at the truck receiving platform; an average of three freight cars per week are received at the railroad receiving platform. Goldblatt's receiving clerk makes up the upper half of the "receival." See Exhibit 3. The goods, after being unloaded and checked, are then moved by Goldblatt's employees to the appropriate stock department and there unpacked, counted, checked, and placed on shelves, in bins, or stacked. Butter, eggs, and cheese are placed in a cooler, and liquor and beer are placed in a vault for safekeeping. In each stock department the lower half of the "receival" is completed. Orders for all Goldblatt stores are filled from said stock departments.

22.

The normal procedure followed at this 63rd Street Warehouse by Goldblatt's employees in picking orders from stock is as follows: Merchandise is picked from stock as required by a particular store order. This order is then checked and packed in containers such as cartons or boxes. This order is then placed on a handling truck

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and transported to the appropriate store run located
80 on the loading and shipping platform, described in paragraph 19(b) hereof. Goods are then loaded from the store runs onto Goldblatt trucks and trailers. After the goods are loaded, the vehicle is locked and sealed by Goldblatt's employees. Throughout the day as goods are loaded, other goods are placed in the store runs. A trip sheet is made up for each load. See Exhibit 4. Thereafter, the goods are daily transported to all Goldblatt department stores. Orders not completely picked or packed by quitting time are left in that incompleted state in their respective stock departments until the next working day. Similarly, assembled goods are left in the store runs until the next working day. Trucks or trailers which are loaded and sealed, or partially loaded, or empty remain in the truck pit until the next working day.

23.

a. The defendant has a night watchman stationed at the 63rd Street Warehouse between 5 p. m. and 7 a. m., Monday through Friday, and 24 hours on Saturday, Sunday, and holidays. His post is at the watchman's office, adjacent to the front door of the warehouse, which is located about the center of the building on 63rd Street. After all Goldblatt's employees have been checked out, the warehouse superintendent and night watchman lock the front door. The door is equipped with a time lock and every opening is recorded on a tape. All openings must be authorized and must be explained in the Watchman's Log. No emergency opening may be made except as authorized by defendant. If an emergency arises, the authorization may be obtained by telephone.

81 The night watchman telephones Goldblatt's State Street Store hourly after his rounds. At 6 p. m. he takes the key clock and begins his hourly rounds of the key stations located as follows:

Station No.	Floor	Location
1	2d Floor	Near center of building.
2	1st "	Near northwest corner of building.
3	1st "	Near SW corner of building.
4	1st "	Near SE corner of building.
5	Basement	Boiler room entrance.
6	1st Floor	First cross aisle west of east wall on supporting post.
7	2d Floor	About 50 feet east of center of building.

These stations are so located as to require the night

watchmen to cover the entire 63rd Street Warehouse, guarding all goods in various stages of receipt, storage, and preparation for shipment; all trucks and trailers in the truck pit; and all doors, windows, skylights, ventilators, and other means of entry into the warehouse. The watchmen's hourly tour begins and ends at the guard's office.

On his tour of duty, the night watchman guards against damage by leaks, overflows in the plumbing, the roof, the skylights, and ventilators. On every round, during approximately eight months of the year, he checks the boiler which heats the whole building to see that the automatic water feed and the oil burner are in proper working condition and that there are no leaks. When railroad freight
82 cars are being spotted on the railroad siding adjacent to the east wall of the building, he sees to it that no member of the train crew or anyone else makes entry into the warehouse by climbing to the roof from the freight cars. On his tour of duty he also passes all departments and guards the goods in the warehouse which are being prepared for shipment. In the shipping department he observes the goods in the store runs in readiness for loading, and also observes the condition of the partially loaded trailers and trucks and any trailers and trucks which may be loaded and sealed. In case of fire this night watchman would call the City Fire Department. He would also utilize the fire extinguisher. Outgoing interstore mail is left at the night watchman's office each evening by a Goldblatt employee at the 63rd Street Warehouse, and picked up by the interstore mailman while the watchman is on duty. Incoming interstore mail is received by the watchman at approximately 6 a. m.

b. Defendant's night watchmen stationed at the 63rd Street Warehouse work the following schedule:

Shift	Sun.	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.
			1 Off Relief				
1	7 a.m. to 7 p.m.	5 p.m. to 12 M.	5 p.m. to 9 p.m.	5 p.m. to 12 M.	9 p.m. to 7:30 a.m. Fri.	5 p.m. to 12 M.	5 p.m. to 12 M.
					2 Off Relief		
2	7 p.m. to 7:30 a.m. Mon.	12 M. to 7:30 a.m. Tues.	9 p.m. to 7:30 a.m. Wed.	12 M. to 7:30 a.m. Thurs.	5 p.m. to 9 p.m. Thurs.	12 M. to 7 a.m. Sat.	12 M. to 7 a.m. Sun.

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83 Only one nightwatchman mans a particular station during a shift. For each station, there are two regular night watchmen or one or more relief night watchmen. All of defendant's night watchmen at the 63rd Street Warehouse are employed at a straight hourly rate of 90 cents and work approximately 50 hours per week; they do not receive additional compensation as overtime for hours worked in excess of 40 per week.

24.

Wabash Warehouse.

a. Goldblatt maintains a warehouse at 328 South Wabash Avenue, Chicago, Illinois, hereinafter called the "Wabash Warehouse." This warehouse is directly across the alley from Goldblatt's State Street Store which is located at 333 South State Street; this warehouse serves only the State Street Store.

b. The alley between the Wabash Warehouse and the State Street Store is a public alley carrying traffic one way from north to south between Jackson Boulevard and Van Buren Street. During the day there is a constant stream of trucks and trailers carrying intrastate and interstate traffic to and from the Wabash Warehouse.

c. In the rear of the Wabash Warehouse and opening onto the alley is a truck pit. Behind the truck pit in the said warehouse is a receiving and shipping platform with a capacity for handling the unloading and loading of eight trucks or trailers simultaneously.

84 d. Goods are warehoused throughout the eight floors of the Wabash Warehouse except the first and second floors. On the first floor are retail stores fronting on Wabash Avenue, which are rented by Goldblatt to independent retail enterprises. On the second floor are Goldblatt's State Street personnel offices and employees' recreation rooms.

25.

a. Approximately 22 per cent of the incoming goods received at the Wabash Warehouse is regularly and daily received in interstate commerce from points outside the State of Illinois. Merchandise having a sales value of over 18 million dollars was received at this Warehouse during each of the fiscal years ending January 31, 1950 and 1951. Approximately 2 per cent of the goods shipped from this

warehouse is regularly and daily shipped to Goldblatt's customers located out of the State of Illinois; the sales value of these shipments totaled approximately $180,000 during each of the fiscal years ending January 31, 1950 and 1951.

b. Goldblatt employs approximately 69 persons at the Wabash Warehouse in the receiving, unloading, checking, unpacking, marking, storing, repacking, wrapping, distributing, and shipping goods to Goldblatt's State Street Store customers.

26.

At the receiving and shipping platform of the Wabash Warehouse, described in paragraph 24(c) hereof, Goldblatt employees daily receive, unload, and check incoming
85 goods, 22 per cent of which goods is received in interstate commerce from points without the State of Illinois. The employees deposit these goods on the platform. Thereafter the goods are moved by Goldblatt employees either to marking rooms or to warehousing space in the Wabash Warehouse.

27.

a. The procedure followed at the Wabash Warehouse by Goldblatt employees in handling outgoing goods is as follows: When a sale of merchandise is made in the State Street Store, the sales clerk makes up a delivery slip showing the customer's name, address, and the goods sold. The goods are wrapped and a delivery slip is attached to the package. The package is then taken to the Wabash Warehouse shipping room. In the shipping room the package is checked and thereafter placed on a conveyor belt which takes it to the loading and shipping platform. At the shipping platform it is taken off the conveyor belt and loaded on to a Goldblatt truck or trailer. After the truck or trailer is fully loaded, it is taken to the west loading building of the Ashland Garage. Here the packages are sorted for delivery to Goldblatt customers, as described in paragraph 15(c) hereof.

b. Mail orders are regularly and daily received at the State Street Store. These orders total approximately $100,000 a year. Most of these mail ordere are received from customers without the State of Illinois. The procedure for filling mail orders is as follows: The goods are

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selected, wrapped, and labeled in the State Street Store.

The mail order goods are then taken to the ship-
86 ping room in the Wabash Warehouse where they are checked and the postage added. The order is then conveyed to the loading and shipping platform where it is loaded on to a Goldblatt truck or trailer and taken to the United States Post Office. Express shipments made at the request of the customer are handled in approximately the same manner except that the express company's truck calls for the shipments at the shipping platform.

28

a. The defendant employs a day guard at the Wabash Warehouse who is stationed at the receiving and shipping platform and in the alley between Jackson Boulevard and Van Buren Street. His duty is to guard against theft or any other damage to goods and vehicles either being received at or shipped from the Wabash Warehouse. This day guard is required to keep the alley clear of traffic. He directs incoming trucks and trailers, carrying both local and interstate goods, through the alley and into the truck pit. He also directs all outgoing trucks and trailers from the truck pit out of the alley. He is required to examine the seals on all incoming Goldblatt trailers. In the case of so-called "valuable" goods, such as furs, jewelry, hosiery, etc., received at the Wabash Warehouse, the day guard is required to watch the unloading of such goods, and is also required to make certain that they are received intact by the particular Goldblatt employee designated to receive said "valuable" goods. He also observes the incoming goods throughout the receiving, unloading, and checking process at the receiving platform in the Wa-

bash Warehouse. With regard to outgoing shipments
87 from the Wabash Warehouse, no trailer or truck is permitted to depart until the seals have been placed on the vehicles; it is the duty of the day guard to note the numbers of the trailers and authorize the departure of the trailers. The day guard also checks to see that all goods being shipped out of the warehouse are accompanied by either a trip sheet or door pass signed by an authorized Goldblatt employee; this includes express and parcel post shipments which are made daily in both intrastate and interstate commerce. He is also charged with the duty of preventing unauthorized persons from entering the Wa-

bash Warehouse through the receiving or shipping platform. This day guard is also required to guard the State Street Store, where he makes a complete round of the outside of the store, checking all doors, windows, and other possible means of entry from the outside to the store.

b. the day guard works 6 days a week, from 8 a. m. to 5:45 p. m., Monday through Saturday, with an hour for lunch, at the Wabash Warehouse, and from 6 a. m. to 8 a. m. at the State Street Store. He is paid a salary of $52.60 per week for the hours at the Wabash Warehouse, and $1 an hour or a total of $12 for the hours at the State Street Store. This day guard does not receive any additional compensation as overtime for hours worked in excess of 40 per week.

28½.

Defendant's employees employed at the Wentworth Warehouse, the Ashland Avenue Warehouse and Garage, the 63rd Street Warehouse, and the alley between the State Street Store and the Wabash Avenue Warehouse do not physically handle the goods received at or shipped from said warehouses, except insofar as they may handle stolen goods recovered by defendant's employees, as described in paragraphs 8(e), 17(e), and 31(d) hereof. The total amount of stolen goods recovered by defendant's employees is approximately $300.00 per year.

29.

Lexington Bakery.

a. Goldblatt operates a bakery at 2608 Lexington Street, Chicago, Illinois, hereinafter called the "Lex-
88 ington Bakery." Bakery goods of all description are produced for Goldblatt's retail stores, including the stores at Hammond and Gary, Indiana. The total sales value of bakery goods produced at the Lexington Bakery is in excess of $1,100,000 per year. Approximately 90 per cent of the raw materials and ingredients used in the production of the bakery goods is received in interstate commerce from sources outside the State of Illinois. Approximately 17 per cent of the bakery goods produced at the Lexington Bakery is regularly produced for interstate commerce and is daily shipped, delivered, and transported in interstate commerce from the said bakery to Goldblatt's

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stores in Hammond and Gary, Indiana. Goldblatt employees are engaged in the production of bakery goods 24 hours each day during the week, except during the period between 11 a. m., Saturday, and 6 a. m., Sunday.

b. Defendant employs a night watchman at the Lexington Bakery from 4:30 p. m. to 6:30 a. m., Sunday through Friday, and until 6:30 a. m. Saturday and from 11:30 a. m., Saturday, to 6 a. m., Sunday, and Sundays and holidays—24 hours. These night watchmen work in one-man shifts. The duty of the night watchman is to guard against fire, theft, or any other damage to the Lexington Bakery building or goods contained therein. The night watchman is required to patrol the entire premises constantly during his tour of duty. The night watchman makes regular hourly rounds, carrying a watchman's clock into which, at each of 13 stations, he inserts a key. The keys must be inserted in the lock in accordance with a regular order. The defendant's night watchman is also required to keep the front door of the Lexington Bakery locked and to
89 check Goldblatt employees in or out of this door. In the event of fire, he notifies the City Fire Department immediately. At the same time, he would also utilize the fire extinguisher. These activities and duties performed by defendant's night watchmen constitute the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, as amended.

c. Until May 1, 1949, night watchmen employed at the Lexington Bakery worked in excess of 40 hours per week, and were compensated by defendant at a straight hourly rate of 85 cents and received no additional compensation as overtime for hours worked in excess of 40. Since May 2, 1949, these night watchmen were paid time and one-half their regular hourly rate of pay for all hours worked in excess of 40 per week.

30.

Martin Food Products, Inc.

a. Martin Food Products, Inc., a wholly-owned subsidiary of Goldblatt, was engaged in the production of food products, such as jams, jellies, and peanut butter, at 3641 South Iron Street, Chicago, Illinois, until October 1949, at which time the said Martin Food Products, Inc. ceased business. A substantial portion of the raw materials and ingredients used in the production of the food

products by the said Martin Food Products, Inc. was received in interstate commerce from sources outside the State of Illinois. A substantial portion of the goods produced by the said Martin Food Products, Inc.'s employees was regularly produced for interstate commerce and was daily shipped, delivered, and transported in interstate
90 commerce from the said Martin Food Products, Inc. to Goldblatt's retail stores in Indiana.

b. Defendant employed night watchmen at the said Martin Food Products, Inc. until July 30, 1949, when Martin Food Products, Inc. discontinued the services of the defendant. The duties of the night watchmen were to guard against fire, theft, and any other damage to the building of the Martin Food Products, Inc. or goods contained therein. The services rendered by the aforesaid night watchmen were similar in nature to those performed by defendant's night watchmen stationed at the Wentworth Warehouse and Ashland Warehouse and Garage, as described herein.

c. Until July 30, 1949, defendant's night watchmen employed at the Martin Food Products, Inc. establishment worked in excess of 40 hours per week and were paid at a straight hourly rate or straight weekly salary without receiving additional compensation as overtime for hours worked in excess of 40.

31.

Defendant's Central Office.

a. Defendant employs approximately 10 employees in its central office at 343 South Dearborn Street, Chicago, Illinois. These employees perform the administrative work in connection with defendant's business of furnishing watchmen, guard, detective, fire inspection, and
91 shopping service to Goldblatt. These central office employees hire, assign, and direct the work of all night watchmen, day guards, and detectives employed by defendant in all Goldblatt warehouses and stores. The central office employees maintain all the books and records in connection with defendant's business.

b. The defendant employs in the central office the following corporate officers and supervising employees: Edwin Boltz, president, supervises the administrative work in connection with furnishing of protection service to Goldblatt. Charles Regan, vice president, is chief super-

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visor of all detectives, guards, and watchmen; he also manages defendant's office in the Goldblatt State Street Store. Marcella Main, assistant secretary, is the office manager and is in charge of central office personnel, including a bookkeeper, statement clerk, and until April 1, 1951, a switchboard operator. Eugene Tomezak is supervisor of all day guards and detectives. Bernard C. Poehler is supervisor of all night watchmen. Russell Tomezak, chief shopper, is supervisor of shoppers.

c. The bookkeeper employed by defendant in this central office keeps the defendant's pay roll records, cash disbursement book, sales journal, cash receipts, general ledger, check book, and bank record book. She makes up the pay roll every week, balances the cash disbursements every week, and balances all other books every 4-week period. She prepares and submits weekly to Goldblatt detailed cash disbursement reports, billing Goldblatt for the
92 total detective, day guard, and night watchmen pay-roll, plus 3.6 per cent of the gross for Social Security and Unemployment Compensation contributions. She makes the Social Security, Unemployment Compensation, and Withholding Tax returns and pays them to the State of Illinois, the State of Indiana, and the Collector of Internal Revenue.

Each week the bookkeeper receives from each Goldblatt warehouse or store the records of hours worked daily and salary rate for all defendant's detectives, day guards, and night watchmen employed in the particular Goldblatt establishment. These time sheets are delivered by the bookkeeper to Mr. Eugene Tomezak or Mr. Poehler, who check over the time sheets and then enter on the said sheets the time for which the employee is to be paid. Thereafter, the bookkeeper makes up the pay checks. She normally distributes the pay checks by mailing them to the Goldblatt establishment where defendant's employees are stationed, including the Hammond and Gary (Indiana) Goldblatt stores. The bookkeeper maintains individual earnings records for all defendant's employees.

A true and correct copy of an employee's earnings record of defendant for the year 1949 is attached hereto, marked Exhibit 13, incorporated herein, and made a part hereof. True and correct copies of time sheets maintained for defendant's employees for the pay roll periods ending March 5 and 12, 1949, and December 9, 1950, are attached hereto, marked Exhibits 14-A, 14-B, 14-C, 14-D, 14-E, 14-F,

14-G, and 14-H, incorporated herein, and made a part hereof. These exhibits are time sheets for defendant's day
93 guards, night watchmen, and house detectives employed at the Wentworth Warehouse, the Ashland Warehouse and Garage, the 63rd Street Warehouse, the Hammond (Indiana) Department Store, and Gary (Indiana) Department Store, and time sheets for defendant's central office employees. The said Exhibits 13, 14-A, 14-B, 14-C, 14-D, 14-E, 14-F, 14-G, and 14-H constitute all of the employment records kept by defendant for its employees employed in the aforesaid places of business, and the said records are typical of records of hours worked and wages paid to said employees to the date hereof.

d. The statement clerk, employed by defendant in its central office, is engaged in receiving and recording information obtained from defendant's detectives and day guards stationed in all Goldblatt warehouses and stores with respect to arrests made by them. When a dishonest employee or shoplifter is arrested, the defendant's detective or day guard makes up a yellow card. See Exhibit 6 hereof. On this yellow card, he records information concerning the theft, the circumstances surrounding it, and a description of the person involved. The defendant's detective or day guard telephones this information to the statement clerk in defendant's central office. While he holds the telephone, the statement clerk checks defendant's records to see whether the record contains information with regard to the person arrested. She gives the detective or day guard whatever information is available. The detective or day guard in each of Goldblatt's establishments prepares and sends to the statement clerk a yellow card, Exhibit 6; a Voluntary Statement, Exhibit 7; a Release, Exhibit 8;
94 a Store Detective or Employee Statement, Exhibit 9; and a monthly statement of arrests, receipts of returned stolen goods, the statement clerk acknowledges receipt of these documents. If the arrest involves an employee of Goldblatt, the statement clerk prepares a do-not-hire card on a form, attached hereto, marked Exhibit 15, incorporated herein, and made a part hereof. It is her responsibility to deliver the do-not-hire cards almost daily to Goldblatt's State Street Store. Upon the receipt of the cards by Goldblatt, the information is made available to all Goldblatt stores. The statement clerk makes up index cards of information obtained from the detectives or day guards. Each month the statement clerk prepares and sub-

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mits a statement to Goldblatt's showing the arresting detective or day guard, persons arrested, goods taken, and goods returned.

e. Until April 1, 1951, the defendant employed a switchboard operator in the central office. The duties of the switchboard operator (since April 1, 1951, performed by the bookkeeper and statement clerk as herein below set forth) were as follows: She handled all incoming and outgoing telephone calls through defendant's switchboard in the central office. She handled all calls between the central office and defendant's employees stationed in all Goldblatt warehouses and stores. Calls to and from Goldblatt Indiana stores occur daily. In the event a Goldblatt trailer or truck left one of the Goldblatt warehouses or stores for another Goldblatt establishment too late to arrive before closing time, the switchboard operator received a call from defendant's employee stationed at the point of departure informing her of this fact. The switchboard operator thereupon telephoned to defendant's employee at the des-
95 tination point and notified him that a trailer would arrive late. In case any person was required to remain in or to enter a Goldblatt establishment after closing hours, the switchboard operator was advised to this effect by a Goldblatt executive. She then telephoned this information to defendant's employee at the Goldblatt establishment involved. She also noted the late opening in a record book kept at the switchboard. When a bad check was cashed in a Goldblatt store, defendant's detective telephoned the information to the switchboard operator, and she, in turn, telephoned the same information to defendant's detectives at all Goldblatt stores. The central office of the defendant has a direct telephone line to all Goldblatt stores and warehouses except the South Bend, Indiana store. Since April 1, 1951, the duties of the switchboard operator have been and are being performed by the bookkeeper on Monday, Wednesday, Thursday and Friday, and by the statement clerk on Tuesday, in addition to their other duties described in paragraphs 31 (c) and (d).

f. The defendant does not maintain a record of hours worked each workday and total hours worked each workweek for its bookkeeper, statement clerk, and switchboard operator employed in the central office. Prior to August 1, 1950, the said bookkeeper, statement clerk, and switchboard operator were compensated on the following basis:

They received a salary for a 5-day week of approximately 35 hours. Each girl worked every third Saturday 8¾ hours, for which she was paid a day's pay. No additional compensation as overtime was paid to the said bookkeeper, statement clerk, or switchboard operator for hours worked in excess of 40. Since August 1, 1950, the three office employees have worked approximately 35 hours per week.

96 g. Defendant employs a fire inspector who works out of the central office. His duties are to inspect all Goldblatt warehouses and stores to make certain that there is compliance with the rules and regulations of insurance association underwriters so that no insurance will be cancelled, and that there is compliance with the city fire ordinances. He inspects all Goldblatt warehouses and stores in Chicago once a week, and the three Indiana stores as well as the Joliet, Illinois store biweekly. At each Goldblatt establishment he inspects all fire extinguishers and sees that they are properly loaded. Twice a year he supervises fire drills at each Goldblatt establishment. He makes daily reports with respect to fire hazards discovered on his inspections and the measures taken to correct the fire hazards to Mrs. Marcella Main, the office manager.

The fire inspector is subject to call at all times. He normally works from 5 to 7 hours a day, 6 days a week, and is paid a weekly salary of $60. He does not receive any additional compensation as overtime for hours worked in excess of 40. The defendant does not maintain a record of the hours worked each workday and total hours worked each workweek by the fire inspector.

32.

Goldblatt carries insurance on the building and contents of the Wentworth Warehouse, the Ashland Warehouse

97 and Garage, the 63rd Street Warehouse, and the Lexington Bakery as follows:

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	Fire and Extended Coverage Insurance on Building	Fire and Extended Coverage Insurance on Contents of Building	Sprinkler Leakage Ins. on Building	Sprinkler Leakage Ins. on Contents of Building	Internal and External Hold-up Insurance
Wentworth Warehouse	$ 929,000	$3,000,000	Included in fire and extended coverage policies		$ 6,000—Int. 1,000—Ext.
Ashland Warehouse and Garage	1,910,000	1,750,000	"	"	50,000—Int. 1,500—Ext.
63rd Street Warehouse*	245,000	900,000	None	None	25,000—Int. 1,000—Ext.
Lexington Bakery	164,000	250,000	$20,750	$125,000	500—Int. 500—Ext.

* In addition, at the 63rd Street Warehouse there is open stock burglary insurance in the amount of $50,000 covering only the liquor stored in the vault.

It is the practice of fire insurance companies to graduate the rate charged for fire insurance in accordance with the degree of risk presented. As a general rule, the plant which maintains a night watchman making hourly rounds is accorded a lower insurance rate than an identical plant which maintains no such watchman. The maintenance of night watchmen making hourly rounds of key stations in the Wentworth Warehouse, the Ashland Warehouse and Garage, the 63rd Street Warehouse, and the Lexington Bakery has resulted in Goldblatt obtaining a lower insurance rate than would have been possible without the aforesaid night watchmen. At the Wentworth Warehouse the premium savings approximate 5 per cent, or $46.45, on the building, and 4 per cent, or $150.00, on the contents of the building. At the 63rd Street Warehouse the premium savings approximate 5 per cent, or $15.60, on the building, and 3 per cent, or $270.00, on the contents thereof. At the Lexington Bakery, the premium savings approximate 1.04 per cent, or $16.40, on the building, and 4/5 of 1 per cent, or $25.00, on the contents thereof. At the Ashland Warehouse and Garage the premium savings approximate 2 per cent, or $19.10, on the building, and 1 per cent, or $17.50, on the contents thereof. There are a number of other factors which affect Goldblatt's fire insurance premiums, including the location of buildings, the construction of buildings, the presence or absence of a sprinkler system, and the kind of merchandise offered.

98

33.

Goldblatt carries insurance on the transpo[illegible] of goods by its motor fleet consisting of 127 trucks and 70 trailers drawn by 17 tractors. The ability to obtain this insurance is affected by the security measures used by defendant's employees and Goldblatt employees. This is true with regard to the practice of sealing Goldblatt vehicles and keeping records of the seals, as described herein.

34.

While from time to time (1) Goldblatt warehouse and bakery operations have been carried on in different buildings, (2) departments have been changed from one warehouse to another, and (3) departments have been added, eliminated, expanded or reduced, the general character and function of the various departments and the general duties of Goldblatt employees in the departments have remained substantially the same continuously from 1938 to the date hereof.

35.

The duties of the defendant's employees and their relationship to the Goldblatt operations have remained substantially unchanged since 1938.

It is further stipulated and agreed that for the period from October 1, 1947, to the date hereof, the matters
99 set forth in this stipulation shall be accepted as true and correct, but each of the parties hereto reserves the right to challenge the admissibility of any statement contained in the stipulation on grounds of irrelevance or immateriality.

Dated: November 9, 1951.

William S. Tyson,
Solicitor,
Herman Grant,
Regional Attorney,
Richard W. Proctor,
Attorney,
Attorneys for Plaintiff, United States Department of Labor.

Stanford Clinton,
Jay A. Pritzker,
Attorneys for Defendant.

100 Endorsed: United States District Court. • • (Caption—49-C-1558) • • Stipulation. Filed Nov. 13, 1951. Roy H. Johnson, Clerk.

• • • • •

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108 And afterwards on, to wit, the 4th day of April, 1952, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice in words and figures following, to wit:

109 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1558) * *

NOTICE.

To: Mr. William S. Tyson, Solicitor
Mr. Herman Grant, Regional Attorney
Mr. Richard W. Proctor, Attorney
Attorneys for Plaintiff,
United States Department of Labor
Merchandise Mart, Room 1200
Chicago 54, Illinois

Please Take Notice that on Friday, April 4, 1952, at 10:00 A. M., or as soon thereafter as counsel can be heard, we shall appear before the Honorable J. Samuel Perry, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, in the courtroom usually occupied by him in the U. S. Court House, Chicago, Illinois, and then and there move as follows:

1. For leave to file the brief of the defendant instanter;
2. To have this matter set down for hearing for taking of additional testimony; and
3. To have this matter set down for oral argument; at which time and place you are requested to be present.

Stanford Clinton,
Jay A. Pritzker,
Attorneys for Defendant.

State of Illinois, } ss.
County of Cook. }

Daisy B. Cain, being first duly sworn, on oath deposes and says that she served the foregoing Notice upon the above-named Messrs. William S. Tyson, Herman Grant, and Richard W. Proctor, Attorneys for Plaintiff, by enclosing true copies thereof in envelopes, postage prepaid, addressed to them at Room 1200, Merchandise Mart, Chi-

cago 54, Illinois, and depositing same in the United States mail chute at 134 North La Salle Street, Chicago, Illinois, at the hour of 5:30 P. M., the 2nd day of April, 1952.

Daisy B. Cain.

Subscribed and sworn to before me this 2nd day of April, 1952.

Honora Harris,
Notary Public.

(Seal)

110 And on the same day, to wit, on the 4th day of April, 1952, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable J. Sam Perry, District Judge, appears the following entry, to wit:

111 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1558) * *

On motion of the defendant by its counsel it is

Ordered that leave be and is hereby granted to the defendant to file brief instanter and that plaintiff's brief shall be filed by April 25, 1952, and also on motion of the defendant by its counsel it is

Ordered that this cause be and it is hereby set for hearing for taking of additional testimony on April 8, 1952, at 9:15 A. M.

112 And afterwards on, to wit, the 20th day of June, 1952, there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had On April 11, 1952, Before The Honorable J. Sam Perry, Judge, in words and figures following, to wit:

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114 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1558) * *

Transcript of proceedings had in the above-entitled case before Hon. J. Sam Perry, one of the Judges of said Court, in his court room in the United States Court House, Chicago, Illinois, Friday, April 11, 1952, 9:30 o'clock a. m.

Present:

Mr. Richard W. Proctor, appeared on behalf of plaintiff;

Mr. Stanford Clinton, appeared on behalf of defendant.

115 Mr. Clinton: If your Honor please, this is a suit involving alleged violations of the so-called Fair Labor Standards Act of 1933, as amended.

The parties have stipulated as to the great mass of facts involved, and your Honor gave us this time to introduce a little additional testimony.

We are ready, your Honor.

The Court: All right, you may proceed.

(Witnesses sworn.)

Mr. Clinton: To facilitate our understanding of the testimony, your Honor, the defendant is a company engaged in the furnishing of watch service and shopping service and detective service. Primarily it is the Goldblatt chain of stores and its warehouses.

Our testimony this morning has to do with the duties and compensation of a group of about four employees in the central offices of the company at 343 South Dearborn Street. That is what this witness will testify to.

116 MARCELLA MAIN, called as a witness herein on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Clinton.

Q. What is your name?
A. Marcella Main.
Q. Where do you live?
A. 2322 North Commonwealth.
Q. What is your business or occupation?

A. Secretary and office manager.
Q. For the Joyce Agency, Inc.?
A. Yes.
Q. I think you are also employed by another concern, Boltz & Boltz?
A. That is right.
Q. Where do you work?
A. 343 South Dearborn, Joyce Agency.
Q. As office manager what are your duties, the nature of your duties?
A. To supervise the work of the switchboard operator, the bookkeeper, general office.
Q. In the office of Joyce Agency, Inc.?
A. Yes.

117 Q. How many employees are there in the offices of Joyce Agency, Inc. at 343 South Dearborn?
Mr. Proctor: It is in the stipulation.
The Witness: About eight or ten.
Mr. Clinton: It has been changed.
Q. There is yourself, is that correct?
A. Yes.
Q. You are the office manager and secretary, is that right?
A. Yes.
Q. There is the secretary to Mr. Boltz?
A. Yes.
Q. Who is that?
A. Margaret Fitzgerald.
Q. Then there is a switchboard operator?
A. Yes.
Q. What is her name?
A. Genevieve Christ.
Q. Then there is a bookkeeper, is that right?
A. Yes.
Q. Her name?
A. Florence Pridmore.
Q. With respect to the girls, all of the girls that work in the office at Joyce Agency, Inc., what is their work

118 week?
A. 35 hours.
Q. And when do they come to work?
A. We have a staggered office routine, nine to five, nine-thirty to five-thirty; quarter to ten to quarter to six.
Q. Will you separate the employees, please?
The Court: Do you mean they are staggered?

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The Witness: Yes.

The switchboard operator opens the office at nine, leaves at five. The bookkeeper, nine-thirty to five-thirty. The two secretaries come in at a quarter of ten and leave a quarter to six.

By Mr. Clinton:

Q. How long has it been, Mrs. Main, that the girl employees in that office have worked a work week of 35 hours?

A. At least for the past two years.

Q. On Saturday is the office open?

A. Yes, sir.

Q. Who works in the office on Saturday?

A. None of the girls in the office.

Q. A special girl?

A. Yes.

Q. A separate girl from any of the other four of
119 you, is that right?

A. Yes, sir.

Q. Prior to two years ago when the girls were put on the 35-hour week, what was their work week?

A. They have always been on a 35-hour week for the past ten years.

Q. But you handle the Saturday a little differently?

A. Yes, that is right. When we had four girls in the office one of them would work each Saturday. They would take turns to work a Saturday.

Q. And for how long would they work on Saturday?

A. From nine in the morning until six.

Q. So that every fourth week one girl would work 44 hours, is that correct?

A. Yes, sir.

Q. That was two years ago. But since the last two years they have been working the 35-hour week, is that right?

A. Yes, sir.

Q. Now, you are the office manager of the office?

A. Yes, sir.

Q. And your compensation is how much?

A. $65.00 a week.

Q. From Joyce Agency?

120 A. Yes.

Q. And you have compensation from another concern?

A. Yes.
Q. For those same hours?
A. Yes.
Q. How much is that?
A. Oh, on a weekly salary, $10.00 a week.
The Court: This other company pays $10.00?
The Witness: Yes.
The Court: In addition to what you get there?
The Witness: Yes, sir.

By Mr. Clinton:

Q. But all your work is performed within a span of a 35-hour week?
A. Yes.
The Court: What other company?
Mr. Clinton: It is Boltz & Boltz.
Q. Is that the name of it?
A. Yes.
Q. And they have offices there with you, is that correct?
A. Yes.
The Court: Do they pay Social Security and all of that?
121 The Witness: Yes, sir.
The Court: On your work?
The Witness: Yes.
The Court: So that you are a regular employee of theirs?
The Witness: Yes, sir.

By Mr. Clinton:

Q. Mrs. Main, in connection with the use of the switchboard in the offices of the Joyce Agency, are there ever calls placed through the switchboard to the so-called Indiana stores of Goldblatt Brothers?
A. Yes, sir.
Q. And those Indiana stores are located at Hammond, at Gary and at South Bend, is that correct?
A. Yes, sir.
Q. Let us assume that a call is either incoming or outgoing from the Indiana stores of Goldblatt, will you please explain to Judge Perry how that call is handled?
A. Whoever is making the call picks up the phone and the switchboard operator gives him a direct line to the Gary or Hammond store, we have a direct line through-

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out the Goldblatt stores, and she plugs that line in and they make the call direct.

122 Q. In other words, if you, for example, wanted to call the Hammond store you would pick up your phone and ask the State Street store—is that what you do?

A. Yes.

Q. The State Street store of Goldblatts?

A. Yes.

Q. When the State Street store of Goldblatt operator answers, you would ask for Hammond, is that right?

A. Yes.

Q. And the State Street store operator would plug the store in, is that correct?

A. Yes.

Q. Can you tell us how frequently calls are placed in Indiana in the overall operation of Joyce?

Mr. Proctor: I will object to that question and that line of questioning unless you first qualify the witness.

Mr. Clinton: She is the office manager.

Mr. Proctor: That does not show any knowledge of how many calls go through the telephone switchboard.

The Court: He means through her own telephone.

123 Mr. Proctor: Through her own telephone, I have no objection, if you limit it that way.

The Court: I understand you are talking about through her own telephone.

Mr. Clinton: No, I meant through the entire switchboard. I understand this lady is the supervisor.

The Court: Do you mean the entire switchboard of Joyce?

Mr. Clinton: Of Joyce.

The Court: That is what he is thinking, that you are talking about the entire switchboard of Goldblatt. But if she is talking about her own Joyce switchboard, he is satisfied.

Mr. Proctor: No, no. Even the Joyce switchboard, I don't see any qualification or foundation for that particular question.

The Court: She is the manager.

Mr. Proctor: She is the manager of the office.

The Court: Yes.

Mr. Clinton: The supervisor.

Mr. Proctor: How would she know what calls go

124 through the board?

By Mr. Clinton:

Q. What authority if any do you have over the switchboard operator?

A. Supervisory capacity.

Q. Do you employ her?

A. Yes.

Q. Do you fix her compensation?

A. To some extent, yes.

Q. And do you direct her in the performance of her duties?

A. Yes, sir.

Q. Are you familiar with the nature of her duties?

A. Yes, sir.

Q. Are you familiar with the operation of that board?

A. Yes.

Q. Have you yourself sat at the board?

A. Yes, sir.

Mr. Proctor: I still object to the question as to the number of calls, the method of handling it—

The Court: So as to clarify it, I will ask her this: Do you know the proportion of calls that are purely local
125 as compared to those that would go through Hammond and Indiana? Do you know an approximate percentage of calls that would be local as compared to the calls that would go to Indiana through your switchboard?

The Witness: Yes, your Honor.

The Court: All right. Is it within your knowledge?

The Witness: Yes.

The Court: I think that is sufficient. She may answer.

Mr. Proctor: I think she ought to tell how she knows that.

The Court: I am satisfied that she is in charge of it, she has sat at the switchboard. It is a comparatively small arrangement, and so on. That would be sufficient, I believe. She may answer.

By Mr. Clinton:

Q. What percentage of calls go through that board, would you say?

A. On what would I base the percentage?

Q. How much time a day would you say the operator at that board devotes on the average to Indiana calls,
126 either incoming or outgoing, through the State Street store, or approximately?

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A. I would approximate about a half hour a week in a 35-hour week.

Q. Are there ever any other occasions when there are calls that are not made that either come in or go out to Indiana without going through the State Street store?

A. Yes. If it is necessary for us to get in touch with the store immediately and the line is busy we might get it through State Street.

Q. Did you at my request investigate the number of such calls since the first of the year?

A. Yes.

Q. How many were there?

A. Three.

Mr. Proctor: I am going to object to that because I assume—I do not object to your question as to her making an examination, but I do object to the questions that will follow that, and I want to get my objection in.

Mr. Clinton: You are objecting to the question I have not asked yet?

127 Mr. Proctor: I want to object to that line of questioning because I assume that when she made this investigation she had some records or something. If she had some records the records would be the best evidence of the number of calls that went that way, and not her testimony from an examination she made.

The Court: I think the record there of course may possibly be the best evidence, but on the other hand it would be quite cumbersome to bring in all of the records back to the first of the year when actually the purpose of this is merely laying a foundation for other questions.

I think that may stand.

By Mr. Clinton:

Q. What records did you look at to determine the number of calls?

A. The telephone bill.

Q. You say there were three such calls?

A. From the first of the year.

Q. Mrs. Main, you say about a half hour a week the girl at the board will handle incoming or outgoing
128 calls. Is there one girl at that board or is she relieved from time to time?

A. She is relieved.

Q. By whom is she relieved?

A. By Miss Pridmore, and occasionally by Miss Fitzgerald, and occasionally by me.

Q. Does Miss Fitzgerald have anything to do with the Indiana stores at all?

A. No.

Q. She is just a secretary to Mr. Boltz?

A. Yes, sir.

Q. Is there any set pattern as to what time of the day or what day of the week the Indiana calls will come, or does that depend upon the circumstances of business as they develop?

A. It depends on the circumstances of business.

Q. So it is impossible to tell, I gather, which girl might be sitting at the board when the Indiana call comes through, is that correct?

A. Yes.

Q. With respect to your bookkeeper, Mrs. Main, what is her name again?

A. Florence Pridmore.

Q. And she prepares, does she not—she makes the 129 book entries on salaries and prepares checks, and so on?

A. Yes.

Q. Does she prepare the checks and keep the wage and salary records of the Joyce employes in Indiana?

A. Yes, sir.

Q. Do you know how many of them there are?

A. At the present time four.

Q. Will you explain to Judge Perry where she gets the information as to the salaries of those men, and describe the process that she goes through in transmitting their compensation to them?

A. The store detective in charge sends in—

Q. Who is that, the store detective?

A. Mr. Pollard perhaps would know.

Q. Mr. Pollard gives the bookkeeper—

A. No. I thought perhaps he might know.

Mr. Proctor: Just a minute. If the Court please, there is in my opinion an adequate description of the process that is gone through in the stipulation. This is completely describing the operation of how these things are prepared and sent in.

The Court: For the purpose of helping the court 130 get this—

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Mr. Proctor: There is not any objection to it except—

The Court: I think she may answer so that I may be able to understand this evidence.

By Mr. Clinton:

Q. Proceed.

A. Mr. Willard and Mr. Schaetzel are the store detectives.

Q. The store detectives in charge of which stores?

A. Gary and Hammond.

Q. Is there a store detective in charge at South Bend?

A. No, sir.

Q. The store detectives in charge at Hammond and Gary do what?

A. Prepare a worksheet which they send to the office through the mail every day, every week, once a week.

Q. And who receives that?

A. The bookkeeper receives it.

Q. In the mail?

A. Yes. And Mr. Tomczak, in charge of store detectives checks those records. He checks to see that the computation is correct, and then he turns that over to the
131 bookkeeper. She makes up the payroll check from that paper. When she is finished with that she puts the check in the mail and sends it out through the mail.

Q. How much mailing does she do per week?

Mr. Proctor: I object to that.

Mr. Clinton: There are four checks.

Mr. Proctor: I object to the question unless you limit it to how much mailing she does in connection with this particular matter.

Mr. Clinton: That is what I am talking about.

The Court: It is so understood.

By Mr. Clinton:

Q. Do you understand?

A. Yes.

Q. In connection with the checks payable to the men working in the Indiana stores how many mailings if any does she make a week?

A. Two.

Q. What are they?

A. These two checks, she sends one to Hammond and

one to Gary. That is, two envelopes, and in each envelope are the checks for the people that work in the store.

132 Q. Once a week she drops two letters in a mail chute?

A. Yes.

Q. Containing the checks for the two detectives in each of those stores?

A. Yes, sir.

Q. That is all she does?

A. Yes.

Q. Are you familiar with the amount of time that she spends in receiving this information and making the necessary entries and writing the checks?

A. On these four people?

Q. Yes, on these four people, weekly.

A. I should judge not more than a half hour a week it would take for that.

Mr. Clinton: That is all.

Cross-Examination by Mr. Proctor.

Q. Mrs. Main, you are the secretary of Joyce Agency, Inc., the corporation?

A. Assistant secretary.

Q. You are assistant secretary. You are a cor-
133 porate officer, is that correct?

A. Yes.

Q. Who is the president of the corporation?

A. Edwin G. Boltz, Sr.

Q. Is Edwin G. Boltz one of the persons you were talking about as Boltz & Boltz that are operating some kind of a business?

A. Yes.

Q. In your office?

A. Yes, sir.

Q. What is the business that Edwin G. Boltz operates, or Boltz & Boltz?

A. Labor relations.

Q. Do they handle labor relations for Goldblatt?

A. Yes, sir.

Q. Do they handle labor relations for anybody else?

A. Yes, sir.

Q. How many customers does Joyce Agency have besides Goldblatt at the present time, do you know?

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A. One other, I believe, at the present time.
Q. Yes. How many employees are employed in that place?
A. One store detective and probably one or two watchmen.
134 Q. How many establishments does Goldblatt have where you employ detectives or watchmen?
A. Fourteen, fifteen, sixteen.
Q. How many employees does Joyce have altogether?
A. At the present time we have a payroll of 85 people.
Q. You testified that there were how many employees employed in the office?
A. Eight, ten.
Q. Eight or ten employees?
A. Yes.
Q. Do you include in those employees the shopping crew?
A. Not as individuals, no, I haven't.
Q. Joyce does employ a shopping crew?
A. Yes, sir.
Q. And this shopping crew does show the stores in South Bend, Hammond and Gary?
A. Yes, sir.
Q. How many employees are in that shopping crew?
A. The supervisor and three employees at the present time.
Q. Have there been more employees in the past?
A. Yes, we have had five, and in peak seasons six.
135 Q. Where is the office of that shopping crew?
A. 343 South Dearborn, Joyce Agency.
Q. So when you testified about there being eight employees there you weren't thinking about the shopping crew as being part of the employees in that office?
A. No, I don't include them, no.
Q. Did you include both Mr. Boltz?
A. Yes, sir.
Q. And the fire inspector or fire chief, Mr. Whalen.
A. Mr. Whalen died some time ago. He is no longer there.
Q. Do you have a fire inspector now?
A. Yes.
Q. Who is that?
A. Mr. Poehler.
Q. The gentleman sitting over here?

A. Yes.

Q. Mr. Poehler was at the time we made the inspection here and up to the time he took over from Mr. Willett the chief of night watchmen, wasn't he?

A. Yes, sir.

Q. How many times have you relieved at the switchboard since the first of the year, we will say, up to the first of April? Let's say the first three months of the 136 year.

A. Perhaps five hours since the first of the year, total.

Q. And how would you say that was, relief at lunch times and things of that character?

A. No, I am thinking especially about a few days when the switchboard operator was home ill and we all had to help out.

Q. Mrs. Main, where do you do your work, most of your work?

A. 343 South Dearborn.

Q. Yes, but I mean at 343 South Dearborn, you have an office of your own, do you not?

A. Yes.

Q. Where is that office located with respect to the rest of the office?

A. Next to Mr. Boltz, Leonard Boltz' office. Just as one walks in from the reception room.

Q. It is in the eastern end of the office, isn't it?

A. Yes.

Q. And where is the switchboard located?

A. More in the western end, west.

Q. Would you say there was as much as forty feet 137 between your office and the switchboard?

A. Twenty feet, I would say.

Q. Can you see the switchboard from your chair and your desk?

A. No, sir.

Q. And the girl you designated as the switchboard operator, is she also sometimes designated as statement clerk?

A. Yes, sir.

Q. And she is performing her statement clerk duties as well as the switchboard operator's duties, is that right?

A. Yes, sir.

Q. All of these people you have said were in the office have occasion to make long distance calls, do they not?

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A. Yes, sir.

Q. Calls that are other than calls to Hammond and Gary, there might be calls to Detroit or New York or St. Louis?

A. Yes, sir.

Q. Or Indianapolis?

A. Yes.

Q. Those calls would be reflected on your telephone
138 bills, would they not?

A. Yes, sir.

Q. You did not bring those telephone bills with you?

A. No, I did not.

Q. Do you know offhand from your checking of those telephone bills what the amounts of your tolls are from month to month? What would an average month be for your toll bills?

A. I don't know.

Q. But you do know that there were only three calls to Hammond or Gary?

A. Yes.

Q. Since the first of the year?

A. Yes, sir.

The Court: As I understand it, those three calls were only at times when there was great emergency, because naturally they wouldn't pay a toll when they can get—

Mr. Proctor: When they have a straight line.

The Court: So I wouldn't attach too much significance to that.

Mr. Proctor: Except—

139 The Court: I mean I myself—

Mr. Proctor: Except that patently they make other long distance calls through the Bell service that they receive bills for. If we had the bills we would know what the size of that is.

The Court: Oh yes. What I meant was that so far as the ratio of the business was concerned, I think that is of very little help—the fact that there were, say, one, two or three calls, it just follows without saying anything more that if they get the calls free they would only use that way in the rarest of emergencies.

So the testimony concerning the proportion of time that is used on the direct wire has much more bearing than that.

By Mr. Proctor:

Q. I show you Exhibit G attached to the stipulation, 140 and an exhibit in this case by virtue of the stipulation, and ask you to look at it and tell me what it is.

Mr. Clinton: I will stipulate to it being what it is.

Mr. Proctor: I want her to look at it.

The Witness: That is a time sheet.

By Mr. Proctor:

Q. For what?

A. For watchmen's service, Mr. Schaetzel, for salary.

Q. For what location?

A. The Hammond store.

Q. The Hammond store?

A. Hammond, Indiana.

Q. How many employees are indicated on that time sheet?

A. Six.

Q. So that at the time that time sheet went in there were six Joyce employees employed in the Hammond store?

A. Yes, sir.

Q. Will you now look at Exhibit 14-H and tell me what that is?

A. A time sheet from Gary, Indiana.

Q. And will you tell me how many employees were 141 employed at the time of that time sheet?

A. Five.

Q. Five of them?

A. Yes.

Q. Were there more or less employees employed by Joyce Agency the first week in March, 1949 than there are now, over all?

A. Than at the present time, yes. At the present time we have only four employees in Indiana.

Q. I didn't ask you that. I asked you whether Joyce employed more employees in March, the first week in March, 1949, than they employ at the present time.

A. Yes.

Q. Over all. Did you have more than 85 employees, or don't you know?

A. In March, 1949? I thought you were referring to Hammond, Indiana.

Q. I am not referring to Hammond or Gary. I am referring to all the employees you had.

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A. I don't know offhand.

Q. Did you ever employ as many as a hundred employees?

A. Yes, sir.

Q. That is, at times?

A. Yes.

142 Q. That is usually when, during a Christmas rush?

A. During Christmas season, yes.

Q. As a matter of fact, you wouldn't know, you would have no way of knowing, would you, how many calls went to Hammond or Gary and any place else during your ordinary day? You are sitting at your desk and calls go through the switchboard and you can't see the switchboard and you can't see the operator working, can you?

A. No, sir.

Q. So that you would have no means of knowing how many calls go through that board?

A. Not just sitting at my desk, no, sir.

Q. Do you keep records of those calls, the calls through the straight line?

A. No, not a written record.

Q. There is no record kept of those calls?

A. No, sir.

Q. So you couldn't have checked any record to determine that there were two or three calls a day, or a half hour of calls a week, could you?

A. No written record, no.

Q. As a matter of fact, the statement clerk makes calls to these various stores, doesn't she, or they make calls

143 to her?

A. Yes, sir.

Q. What is the nature of those calls?

A. That she would make individually?

Q. That she would make or receive as a statement clerk.

A. If we would get a call that bad checks are being passed then she would have occasion to call Gary or Hammond and give that information to our store detective there.

Q. As a matter of fact, it is routine for her to call all the stores and give that information, is it not?

A. Yes, sir.

Q. If a bad check is passed in any of the fourteen or fifteen Goldblatt stores, whichever it is that has that information, it comes to the statement clerk, is that correct?

A. Yes, sir.

Q. If a bad check were passed in Hammond or Gary—how about South Bend?

A. Yes, sir. Not so likely, probably.

Q. It is not so likely a bad check would be passed there, either, is it?

144 A. (No response.)

Q. But if it were, that information would be called to the statement clerk?

A. Yes, sir.

Q. And what would the statement clerk do?

A. She would call the other stores in the chain and notify them what to do.

Q. So every time a bad check is passed in Goldblatts, any of Goldblatt—what is it, fifteen stores?

A. Yes, sir.

Q. The statement clerk makes a call to Hammond and a call to Gary, is that true?

A. Yes, sir.

Q. She gets a call from Hammond or Gary if there is an arrest made out there, doesn't she?

A. Yes, sir.

Q. And what happens then?

A. She takes the information, which is a description of the person involved in the theft.

Q. And she keeps a record of that information, doesn't she?

A. Yes, sir.

Q. And she also gives that information that she may have, if there is a record of that person, she gives a

145 record of that information to the detective in the Hammond or Gary store?

A. Yes.

Q. Or the Chicago store, as far as that goes?

A. Yes, sir.

Q. If that is how it happens.

A. Yes.

Q. Calls are made to Hammond and Gary to arrange for a special opening or a late opening?

A. Yes, sir.

Q. So every time somebody has to stay late in Hammond or Gary a call goes through your board so that that person can get out of the store, is that right?

A. Yes, sir.

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Q. Does the fire inspector, Mr. Whalan in the past and Mr. Poehler now, have occasion to use the telephone?

A. In relation to fire inspection?

Q. In relation to anything. Do they have occasion to use the telephone?

A. Yes, sir.

Q. If they had a call to go to Hammond or Gary or South Bend, that call would go through that switchboard, would it not?

A. Yes, sir.

146 Q. That is also true of Mr. Boltz, if Mr. Boltz has to make a call to Hammond or Gary that will go through either Mr. Boltz'—

A. Yes.

Q. If you have a call to make it will go through?

A. Yes.

Q. Do you have occasion to make a call once in a while?

A. Once in a while.

Q. And receive it?

A. Once in a while.

Q. If the bookkeeper has to make a call it goes through, is that right?

A. Yes, sir.

Q. According to Exhibits 14-G and 14-H, there were watchmen out there at Hammond and Gary?

A. Yes, sir.

Q. They carry some kind of a clock that has a disk in it that records their records, do they?

A. Yes.

Q. Who checks on those disks?

A. I don't know.

Q. I see. Do the disks come in to the office, in to your office?

147 A. No, sir.

Q. You don't check on them?

A. No.

Q. Did you ever hear of the do-not-hire card?

A. Yes.

Q. What is a do-not-hire card?

A. That is a card sent from our office on a dishonest employee, so that the card is sent to the State Street store, giving a description and an accounting of what has happened. They in turn send these cards from the State Street store to all their stores, do not rehire this person again.

Q. And those cards go out to Hammond and Gary?
A. Yes, sir.
Q. Every time a dishonest employee is detected any place in the Goldblatt system one of those do-not-hire cards is made out?
A. Yes, sir.
Q. Who makes that card out?
A. The girl at the switchboard.
Q. The statement clerk?
A. Yes, sir.
Q. And she takes those cards over to Goldblatt every day or so?
148 A. They are sent every day. Either she takes them or somebody from State Street picks them up.
The Court: Counsel, we are going into a lot that is not cross-examination, and I don't know what that has to do with it, what she does at the State Street store.
Mr. Proctor: I think probably that is correct. I think that is all.

Redirect Examination by Mr. Clinton.

Q. Mrs. Main, just a couple of questions. What is a shopper?
A. A shopper is a person who goes to a store with supervisor, makes a purchase and detects the cashier, to see that the money is put in the cash register and is rung up.
Q. And is it also the duty of a shopper to determine and to evaluate the performance of the sales clerk?
Mr. Proctor: I object to what the duty of the shopper is.

By Mr. Clinton:

Q. Anyway, she makes retail purchases, is that correct?
149 A. Yes, sir.
Q. The statements that the switchboard operator sends out, what are those?
A. The statements she receives, that is a description and a confession from the person who has been picked up as a shoplifter.
Q. At the retail stores of Goldblatt Brothers?
A. Yes.
Mr. Clinton: That is all.
(Witness excused.)

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BERN POEHLER, called as a witness herein on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Clinton.

Q. What is your name, sir?
A. Bern Poehler.
Q. By whom are you employed?
A. Joyce Agency.
Q. What is the nature of your duties?
A. I have multiple duties. I have supervision of the watchmen, and I have a guard service, and supply-
150 ing the supplies. I mean, for instance, clock service. That is, dial service, the time clocks for the service. I also have fire supervision on a 24-hour basis, and subject to call at any time.
Q. You say you supervise the watch service. By watch service you mean men doing what and where?
A. Speaking at the present moment?
Q. Yes.
A. At the present moment we have only watch service for Goldblatt at five locations. They are the Ashland furniture warehouse, the Ashland Avenue garage, the Wentworth warehouse, the bakery on Lexington, and the commissary on East 63rd Street.
The Court: Is that all in the City of Chicago?
The Witness: All in the City of Chicago.
We supply and direct watch service in these five cases.

By Mr. Clinton:

Q. What do the men do when you say watch?
A. They patrol the building at regular intervals, and where they do not have A.D.T. service, just clock service, they call in our central office downtown at State Street during the night, patrol the doors and see to it that
151 the time lock is not opened unless at specified schedules.
Q. They are watchmen?
A. Correct.
Q. How many men are there that you supervise doing work—
Mr. Proctor: I am going to object to this line because we set up in the stipulation in great detail the system

they employed, so many men at this place doing so an so. Now we have Mr. Clinton trying to vary—

Mr. Clinton: Oh no.

Mr. Proctor: —the stipulation. I do not object if i is a matter of clarifying to the court the way this is per formed. I think it is amply set out in the stipulation, bu I do not think we ought to be going into matters of hov many men are employed at this place or that place, be cause the stipulation specifically states how many employ ees are employed at each of these places, and it specifically states what they do in detail.

The Court: The point with me is, isn't this complain lodged as of a particular date? What is the impor
152 tance of setting out the present situation?

Mr. Clinton: Here is what has happened, your Honor. There has been a considerable change in opera tions from time to time. There has been a redistribution of duties. Some employees have died. In any event, and I am assuming for the moment, I am making a very brash assumption, that the court is called upon to frame an injunction, in which event the court would have to have before it the actual facts of operation as of the time of trial.

The stipulation took about eighteen months to prepare, and things have changed and varied. The number of men is a very minor detail. I just want to show what this man presently does, that is all.

The Court: For that purpose I think I will overrule the objection.

All right, proceed.

By Mr. Clinton:

Q. How many men are there in those five operations that you—

A. I would say between ten and twelve.

153 Q. And they are directly employees of Joyce?

A. Yes.

Q. Do you have supervisory duties with reference to any other watchmen at any other locations?

A. Yes.

Q. Where are they?

A. They are in all the Goldblatt retail stores.

Q. In Indiana and in Illinois?

A. Yes.

Q. Who are their employers?

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A. Goldblatt Brothers, Inc.
Q. Do you supervise them?
A. Yes.
Q. When you say you supervise them, will you tell the court what you mean by that?
A. Well, I check them periodically during the night or even in the daytime if it is Sunday or a holiday, and the local detective on the scene generally checks the dial and advises me the following morning if any discrepancies had occurred during the night, and if I am out there in person I check the dials also.
Q. Do you have power to hire and fire men?
A. Not in the Goldblatt stores. I have in this respect, that if a man is intoxicated or he becomes ill I can
154 replace him on the scene.
Q. Right at the moment?
A. Yes, sir.
Q. Do you have power to hire and fire the employees in the other locations?
A. In the five locations that we employ direct.
Q. Can you make recommendations as to hiring and firing of employees of Goldblatt?
A. Yes.
Q. Is that given any weight?
A. Yes.
Q. What happens when you make such a recommendation?
A. It generally is taken care of at the very earliest opportunity. They must have a man to replace him before I can demand to have him fired.
Q. If you make a recommendation, what is done about it?
A. It is taken care of.
Q. Do you mean the man is discharged?
A. Yes, within a reasonable time.
Q. How much of your time do you put in in handling and supervising watchmen?
A. Do you mean the entire chain?
Q. Yes.
155 A. I would say between 65 and 70 per cent.
Q. What do you do with the balance of your time?
A. The balance of the time is fire inspection.
Q. Fire inspection?
A. Yes.

Q. How long have you handled that?
A. Since the 27th of December, 1951.
Q. Will you explain to the court what you mean by fire inspection service?
Mr. Proctor: That again has been gone over.
Mr. Clinton: It is different now.
Mr. Proctor: If it is different, then let us have it agreed that what he is doing is not what the fire inspector was doing at the time we drafted the stipulation.
The Court: It would follow that is true.
The Witness: Your Honor, semi-annually we make an inspection in company with the Cook County Inspection Bureau, which is the official body of the insurance agencies, and I accompany them semi-annually through the entire chain, and at that time we describe the failures, in other words, in equipment or sprinkler systems that are 156 inadequate or improperly functioning, and we also make recommendations where additional sprinkler equipment is required or fire doors are required.
I have studied fire protection—

By Mr. Clinton:

Q. You take care of the fire inspection with the fire inspection officials?
A. Yes.
Q. And also make preliminary inspections?
A. Before the fire inspection and periodically throughout the year.
Q. Do you go throughout all the units?
A. Yes.
Q. Do you do this work in the retail stores?
A. Yes.
Q. What percentage of the time you put in on fire inspection work do you put in in inspecting or arranging for inspection by outside officials of the retail stores themselves, both in Indiana and in Illinois?
A. I don't follow your question.
Q. You say you take care of fire inspection work throughout the chain.
A. Yes.
Q. You fire inspect the warehouse properties and 157 garages?
A. Yes.
Q. And the retail stores?

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A. Yes.

Q. How much of the time that you put in on fire inspection is devoted to the stores as distinguished from fire inspection on the warehouse properties?

A. I would say 70 percent.

Q. So that 70 percent of the 35 percent of your time you put in on fire inspection is in the retail stores where the retail selling is going on?

A. Yes.

Q. What is your compensation?

A. $85.00 a week on straight six days a week salary, and $20.00 expense account.

Q. Prior to the time that you took over that fire inspection work who handled it?

A. Mr. Whalen was the most recent.

Q. And he died in June, 1951?

A. Yes.

Q. Was there any replacement for him during that period of time?

A. Between July 1 and December 27, to the best of my knowledge, there was none.

158 Q. Prior to that time he had been ill a good many months, is that correct?

The Court: Why do you need to go into all of that?

Mr. Proctor: I object to that.

The Witness: He had been ill.

By Mr. Clinton:

Q. He had handled that line of work previously?

A. Yes, sir.

Q. And as of the present time the arrangement is that you are handling it together with your other duties, is that right?

A. Yes.

Q. Let me clarify one other thing, and I will be finished.

You work out of the State Street store?

A. No, sir, I work out of 343 South Dearborn.

Q. But you are an ambulatory employee?

A. Correct.

Q. You go around the chain all the time?

A. Yes.

Q. But you office in the central office?

A. 343.

Q. That is your headquarters?

159 A. Yes.

Q. That is where you get the calls?

A. Yes, except at night and holidays.

Q. Suppose you want to make a call to Hammond or Gary or one of the stores. Does a switchboard operator make it for you?

A. Yes.

Q. Do you dial it?

A. She procures a State Street line for me and generally procures the particular store that I want.

Mr. Clinton: That is all.

Cross-Examination by Mr. Proctor.

Q. Mr. Poehler, you referred to the fire inspection as being the semi-annual inspection?

A. By Cook County.

Q. By Cook County?

A. Yes, sir.

Q. How many of those inspections have you made?

A. I have made three to the present time.

Q. When were they?

A. I made one yesterday, and I made the other March 10, 1952.

160 Q. You say these inspections were semi-annual inspections?

A. Yes, semi-annually.

Q. And you made one yesterday?

A. Yes.

Q. That was April 10, and you made one March 10?

A. That is correct.

Q. A month ago?

A. Pardon me. The inspection yesterday was made at Milwaukee and Diversey, known as our Kimball Avenue store. March 10th it was at Lincoln and Belmont, and Broadway and Lawrence.

The Court: Counsel, it is clear to me. Semi-annually for each establishment.

The Witness: Correct.

The Court: And he made one at one establishment yesterday, and he makes two each year.

The Witness: Yes.

The Court: I understand it.

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By Mr. Proctor:

Q. You did not make any inspection of that kind prior to December, 1951?

A. None officially or unofficially, because I wasn't in office.

161 Q. Those inspections are made in the daytime?

A. The official ones are. The others may be and may not be. The official ones are made in the daytime.

Q. If an official one is made at night what happens?

A. There is no official made at night to my knowledge.

The Court: What has that to do with the question of interstate commerce?

Mr. Proctor: I don't know, your Honor.

The Court: The time he is devoting in Cook County, and what his duties are is not important. It is what he is doing out of Cook County, in Indiana or Michigan or anywhere else, that is important here.

By Mr. Proctor:

Q. Did Mr. Whalen go on these semi-annual inspections prior to when, June of 1951?

A. Yes, to the best of my knowledge. I would not know Mr. Whalen's duties because I would have no occasion to. I may travel occasionally with him.

A. That is all on that score.

In connection with the Hammond, Gary and South Bend, Indiana, stores what were your duties for the last four years? What has been the nature of your duties in

162 that connection?

A. Wait a minute. Let's divide it December 21, 1951. My duties changed.

Q. Your duties have changed since then?

A. Yes.

Q. Do you still inspect the clock disks?

A. Yes, sir.

Q. And you go to Hammond or Gary to do that?

A. Yes, sir. And now also fire, since December 27, 1951.

Q. Wait a minute. Let's keep to this. What do you mean when you say fire inspection?

A. I mean I inspect the extinguishers to see they are properly recharged.

Q. When you make your trips to Hammond and Gary—

A. And see there is no fire hazards, inflammable and combustible materials.

Q. Before December that was one of Mr. Whalen's duties?

A. Yes. He passed away.

Q. Do you have some duties with regard to the night watchmen at the 63d Street warehouse, the Ashland Avenue warehouse and the Wentworth warehouse?

A. Yes. I said we employ them. That is one of
163 the five—

Q. Suppose somebody tries to break in the Wentworth warehouse?

The Court: Counsel, what has that to do with it?

Mr. Proctor: Production of goods for commerce is also commerce, and these watchmen engaged in these warehouses are watching goods that are both in interstate commerce and being produced for commerce, and this man is their supervisor. That is what it has to do with it, and they brought in—

The Court: His direct testimony says that he does.

The Witness: Counsel, there is no production in the Wentworth warehouse.

Mr. Proctor: That is not a matter for you to talk about.

Q. You supervise the night watchmen in the three warehouses?

A. Two warehouses.

Q. Two warehouses?

A. Yes.

Q. Who supervises the watchman in the other
164 warehouse?

A. There are only two warehouses, Wentworth and Ashland.

Q. What do you call 63d and Indiana?

A. That is the commissary. That is nothing but commissary.

Q. You supervise the watchman that is stationed there, is that right?

A. Yes.

Q. And all of those watchmen make a record of their rounds, is that right?

A. No, they don't make a record.

Q. The clock makes a record?

A. Yes.

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Q. You inspect the clock disk?
A. Yes.
Q. The Cook County Bureau, Inspection Bureau, inspects the clock disk?
A. They have them in my presence. Whether they do or don't I am not able to answer that question.
Mr. Proctor: That is all.
Mr. Clinton: That is all.
(Witness excused.)

Mr. Clinton: I want to ask your Honor for leave
165 to file an amended answer in this case to set up defenses of exemptions under the local retailing exemptions.

The Court: Leave to file an amended answer will be granted. Counsel may want to reply to that. When do you want to file it?
Mr. Clinton: I can file it in a couple of days.
The Court: Five days, and ten days for you to answer.
Mr. Proctor: Yes.
The Court: Or to plead.
Mr. Proctor: Plead, answer or make a motion to dismiss.
The Court: All right. That will be the order.
Will you make out a memorandum for that motion so that the clerk will get it?
Mr. Clinton: Yes.
The Court: All right.
Mr. Clinton: Thank you, Judge.
(Here followed discussion off the record.)
Mr. Proctor: Mr. Clinton has no further evidence to offer and defendant rests.
Plaintiff rests at this time.
Mr. Clinton: That is agreeable.

167 And to wit, on the 11th day of April, 1952, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable J. Sam Perry, District Judge, appears the following entry, to wit:

168 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1558) * *

This cause coming on for hearing of additional testimony and for hearing on the defendant's motion for leave to file amended answer come the parties by their counsel, respectively, the additional evidence for the defendant is heard and it is

Ordered that leave be and hereby is granted to the defendant to file an amended answer within five days from this date and that the plaintiff shall plead thereto within ten days thereafter.

169 And afterwards on, to wit, the 14th day of April, 1952 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Amended Answer in words and figures following, to wit:

170 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1558) * *

AMENDED ANSWER OF JOYCE AGENCY, INC.

First Defense.

1. Defendant admits the allegations contained in Paragraphs I and II.

2. Defendant admits the allegations of Paragraph III except that it denies that it presently does or for some time past has furnished watchmen and detectives for Martin Food Products, Inc.

3. Defendant admits the allegations contained in Paragraph IV except that it denies that any of said employees is engaged in interstate commerce and except that it states that the amount of production of goods for interstate commerce which occurs within said premises is insignificant and negligible and occurs within a retail establishment or is performed by employees engaged in a local retailing capacity as that term is defined and delimited by the Administrator.

Defendant further denies that any substantial quantity of goods produced by any employee in said premises has been and is being shipped, delivered, transported, offered

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for transportation and sold in interstate commerce from said place of business to other states.

171 4. Defendant admits the allegations of Paragraph V except that it denies that it is engaged in producing any foods, groceries, liquors, candies and cookies at said warehouse, and except that it denies that any employees in said building are engaged in the production of goods for interstate commerce or in processes or occupations necessary to such production, or that any goods produced by its employees on said premises is being shipped, delivered, transported, offered for transportation and sold in interstate commerce.

5. Defendant admits the allegations of Paragraph VI except that it denies that any employees employed at said warehouse are engaged in the production of goods for interstate commerce or processes or occupations necessary to such production, or that any goods produced by its employees on said premises is being shipped, delivered, transported, offered for transportation and sold in interstate commerce.

6. Defendant admits the allegations contained in Paragraph VII of the complaint but states that the goods produced by defendant's employees in said premises is infinitesimal.

7. Defendant admits the allegations of Paragraph VIII except that it denies that it cooks food such as fowl, fish, ham and other meats within said premises.

Defendant further alleges that all of its employees working within said premises are now and for a long period prior to the filing of this Complaint were employed in conformity with the labor standards of the Act.

8. Defendant admits the allegations contained in Paragraph IX. Defendant further alleges that it presently has no employees at Martin Food Products, Inc. and has not had any employees at said premises for a long time prior to the filing of the Complaint.

172 9. Defendant admits the allegations of Paragraph X except that it denies that any of its employees at its office are engaged in the production of goods for interstate commerce and in processes or occupations necessary to such production, or that any goods produced by its employees on said premises is being shipped, delivered, transported, offered for transportation and sold in interstate commerce.

10. Defendant denies the allegations of Paragraph XI except that it admits that in an inconsequential number of

instances the defendant violated the provisions of Sections 7 and 15(a)(2) of the Act and alleges that said violations have long since ceased.

11. Defendant further alleges that its previous violations of the Act were committed under a misapprehension and misconstruction of the applicable law; that upon being advised by the representatives of the Wage and Hour Division of the existence of violations, it promptly ceased and desisted said violations.

Defendant further alleges that it has every intention in utmost good faith to hereafter comply with the labor standards imposed by the Act and that it is utterly unnecessary for the injunctive power of this Court to be invoked.

Second Defense.

The defendant alleges that many of its employees are engaged in a bona fide executive, administrative or professional capacity, or in the capacity of outside salesmen, as such terms are defined and delimited by the regulations of the Administrator. Therefore, Sections 6 and 7 of the Act are not applicable to such of the defendant's employees, in accordance with Section 13(a)(1) of the Act.

173

Third Defense.

The defendant alleges that all of its employees are engaged in a local retailing capacity as such terms are defined and delimited by the regulations of the Administrator. Therefore, Sections 6 and 7 of the Act are not applicable to defendant's employees, in accordance with Section 13-(a)(1) of the Act.

Fourth Defense.

The defendant alleges that all of its employees are engaged in a retail establishment the greater part of whose selling is in intrastate commerce; and therefore, Sections 6 and 7 of the Act are not applicable to defendant's employees in accordance with Section 13(a)(2) of the Act.

Wherefore, defendant respectfully prays that this proceeding be dismissed.

Joyce Agency, Inc.,
By Edwin G. Boltz, Sr.,
President.

Stanford Clinton and Jay A. Pritzker,
134 North LaSalle Street,
Chicago 2, Illinois.

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State of Illinois, } ss:
County of Cook. }

Edwin G. Boltz, Sr., being first duly sworn, deposes and says that he is the President of Joyce Agency, Inc., and that he is duly authorized by the defendant, Joyce Agency, Inc., in this behalf; that he has knowledge of the facts and that the foregoing Answer by him subscribed on behalf of Joyce Agency, Inc., is true.

Edwin G. Boltz, Sr.

Subscribed and sworn to before me this 14th day of April, A. D. 1952.

Daisy Cain,
Notary Public.

(Seal)

Received a copy of the within Amended Answer of Joyce Agency, Inc. this 14th day of April, 1952.

United States Department of Labor,
By Herman Grant by Richard W. Proctor,
Attorney,
Its Regional Attorney.

174 And afterwards on, to wit, the 25th day of April, 1952 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

175 In the United States District Court.
* * (Caption—49-C-1558) * *

STIPULATION.

It Is Hereby Stipulated and Agreed by and between the parties hereto that, for the purpose of this proceeding only, not less than seventy-five per cent (75%) of the sales in each of the retail stores operated by Goldblatt Bros., Inc. are retail sales of goods within the meaning of the Act and are made within the State in which each said store is located.

It is Further Stipulated and Agreed that this cause is hereby submitted on the stipulation heretofore filed and

the evidence heretofore taken in open court. Dated April 24, 1952.

William S. Tyson,
Solicitor,
Herman Grant,
Regional Attorney.
Richard W. Proctor,
Attorney,
Attorneys for Plaintiff, United States Department of Labor,
Stanford Clinton,
Jay A. Pritzker,
Attorneys for Defendant.

176 And afterwards on, to wit, the 19th day of March, 1953 there was filed in the Clerk's office of said Court a certain Memorandum of the Court in words and figures following, to wit:

177 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1558) * *

MEMORANDUM.

Plaintiff brings this action under Section 17 of the Fair Labor Standards Act of 1938, as amended, to enjoin the defendant from violating Sections 17 and 15(a)(2) of the overtime provisions of the Act.

The complaint filed October 13, 1949, alleges that the defendant has since October 1, 1940, employed employees in interstate commerce and in the production of goods for interstate commerce at the warehouses of Goldblatt Brothers, Inc., located at 3913 South Wentworth Avenue, 3161 South Ashland Avenue, 201 East 63rd Street, 328 South Wabash Avenue, the Lexington Bakery and Martin Food Products, Inc. and at defendant's central office all located in Chicago, Illinois, without compensating the employees for hours worked in excess of 40 hours per work week at the overtime rate required by Section 7 of the Act.

The principal issue is whether the defendant's employees were engaged in interstate commerce or the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act.

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Since the defendant has complied with the Act in the case of its employees at the Lexington Bakery since May 2, 1949, and since it has no employees at the Martin Food
178 Products since July 3, 1949, both prior to the filing of this action, the Court considers the question as to defendant's compliance in these two instances as moot. The employees at these establishments, therefore, are not the subject of this decision.

Goldblatt Brothers, Inc. operates a huge merchandise system, involving an annual sale of goods in excess of 90 million dollars a year through 14 retail stores. Approximately 20% of the total sales are made by three Indiana stores and a very large percentage of these goods are distributed from the four warehouses directly to the stores in Indiana by means of Goldblatt's own motor transportation system consisting of 127 trucks, 70 trailers and 17 tractors. Goldblatt Brothers carry a large amount of fire and extended coverage, sprinkler leakage and hold-up insurance on the warehouses and contents and the motor fleet and its activities. Availability of such insurance and the premiums charged therefor is favorably affected by the employment and presence of the defendant's employees.

The sales value of the merchandise handled annually by each warehouse ranges between a figure in excess of 30 million dollars at the Wentworth Avenue warehouse and 10 million dollars at the 63rd Street warehouse. Exclusive of the Wabash Avenue establishment, the warehouses receive regularly and daily no less than 50% of the merchandise from points outside of the State of Illinois. Between 17 and 20% of this merchandise is shipped from three warehouses to points outside of the State. Approximately 22% of the goods received at the Wabash Avenue warehouse is received regularly and daily from outside of the State and 2% is shipped to Goldblatt Brothers' customers outside of the State of Illinois. Goldblatt Brothers, Inc. employs persons at all warehouses, who are engaged in receiving, unloading, checking, unpacking, storing, handling, assembling, repacking for delivery, servicing, transporting to store runs, distributing and the shipping of merchandise to Goldblatt Brothers' department stores and customers.

The defendant is an Illinois corporation with an office
179 at 343 South Dearborn Street, Chicago, Illinois. It is engaged in the business of furnishing watchman, guard, detective, fire inspection and shopping services to Goldblatt Brothers, Inc. All of the Joyce employees have

worked and for the most part are now working in excess of 40 hours a week. They are paid either a weekly salary or an hourly rate and are not paid the statutory overtime required by Section 7 of the Act.

The defendant offers Goldblatt Brothers a highly systematic protection service, which exceeds the normal watchman activity. This service which can be divided into that rendered by the day guards and night watchmen is basically the same in all four warehouses. The primary difference is found in the number of employees used by defendant at the various warehouses to administer this protective service. The number of guards and watchmen at each warehouse seems to be determined by the volume of business activity at each establishment. In general, the defendant's employees are entrusted with the duty and responsibility of guarding Goldblatt Brothers' premises and contents from fire, theft and other hazards. The defendant's guards maintain a close watch over all stages of the respective operations on both the receiving and shipping platforms. They guard, lock and unlock the doors to both platforms and check the traffic of persons at the front door and the shipping platform where only authorized personnel are allowed. They make and maintain memoranda regarding valuable shipments leaving the shipping platforms. These memoranda are transmitted to the front door guard, who in turn notifies by telephone the service guard at the designated retail store. The guards maintain and distribute the stock of truck and trailer seals, guard and check the locks and seals on all incoming and outgoing vehicles, and control the departure of all vehicles. They make telephone calls inside and outside the State relaying information concerning incoming and outgoing goods. They also receive communications from the central office and maintain an instruction log. The guards make up the payroll
180 and handle information and reports on all thefts and recoveries.

The night watchmen patrol the entire premises, guard the goods in all stages of being received, handled, stored, prepared for shipments and shipped including those enroute to the shipping platform and on the receiving and shipping platforms, as well as in the railroad cars and motor trucks and trailers in the truck pit, together with the cars, trucks and trailers themselves from fire, theft and other damage.

It is the plaintiff's contention that Goldblatt's employees

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at each of the warehouses are engaged in interstate commerce and in the production of goods for interstate commerce. From this premise it follows that the guards and watchmen employed by the defendant who guard and watch the goods as they are produced and as they are moving in interstate commerce to and from the warehouses, together with the trucks and freight cars which are the instrumentalities of such commerce and who otherwise participate in the activities there carried on, are also engaged in commerce and the production of goods for commerce.

The defendant denies that its employees are engaged either in interstate commerce or in the production of goods for such commerce. The defendant further contends that its employees are exempt by virtue of the provisions of Section 13 (a) (1) and (2) of the Act.

The Act is designed for the benefit of those employees who are either engaged in interstate commerce or in the production of goods for commerce. Where, as in the case before the bar, the warehouse activities, among other things, consist of the receiving and unloading of goods arriving from other states and of the shipping of goods into other states, such activities are an engagement in interstate commerce. *Walling* v. *Goldblatt Bros.* 128 F. 2d 778. Employees, whose activities contribute so materially and directly or are so closely related to interstate commerce as to be in practice and legal contemplation a
181 part thereof, are to be considered as engaged in interstate commerce, and are, therefore, within the provisions of the Fair Labor Standards Act. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *McLeod* v. *Threlkeld*, 319 U. S. 491. It is the view of this Court that both the day guards and night watchmen, employed by the defendant in the various warehouses do, by virtue of their activities, contribute so materially and directly to interstate commerce as to be a part thereof, and are, therefore, within the provisions of the Act. Their activities cannot be considered as remote local services. They are the integral components of a highly systematic security system which is as important and vital part of this commerce as traffic control and other warehousing and shipping techniques. This is borne out by the fact that the protection service is given not only at the warehouse premises but also during the course of transportation itself, by means of telephonic communications regarding shipments to designated stores. The fact that the night watchmen assume none of these operational

duties, but are limited, more or less, to the patrolling and guarding of the premises during the night hours does not withdraw them from interstate commerce. They guard against fire, theft, and other hazards, during a time of greater need, not only the wares, which are in the process of being received as well as shipped in interstate commerce, but also the vehicles, which are the instrumentalities of that commerce. *Walling* v. *Sondock,* 132 F. 2d. 77, cert. denied, 318 U. S. 772, *Slover* v. *Wathen,* 140 F. 2d 258, *Russell Co.* v. *McComb,* 187 F. 2d.

If this Court is to hold that the defendant's employees are engaged in the production of goods for interstate commerce, it must find that they are engaged "in any closely related process or occupation directly essential to the production thereof." 29 U.S.C.A. 203(j). The Court, therefore, must first determine whether the activities of the Goldblatt employees in the warehouses are production of goods for interstate commerce. Production means "handled or in any other manner worked on." 29 U.S. C.A. 203(j). The terms, "handled" or "worked on" in-
182 clude every kind of incidental operation preparatory to putting goods into the stream of commerce. *Western Union Telegraph Co.* v. *Katherine Lenroot,* 323 U.S. 490, *Engebretsen* v. *E. J. Albrecht Co.* 150 F. 2d 602. Under this judicial interpretation, the manifold activities of Goldblatt's employees in picking, handling, checking, packing and transporting goods destined for Goldblatt's Stores or customers outside the State of Illinois constitute the "production for commerce within the meaning of the Act."

It is the view of this Court that the defendant's employees in the warehouses are engaged in the production of goods for commerce because they are engaged in a "closely related process or occupation directly essential to the production" of goods for commerce which is being carried on at the various warehouses. The importance of this protection service, as previously outlined when the employees' engagement in commerce was discussed, is equally applicable to the production of goods for commerce. The favorable effect of this protection service upon the Goldblatt insurance program also serves to emphasize its importance. It has repeatedly been held that guards and watchmen of premises, where production of goods for interstate commerce is carried on, are also engaged in the production of goods for commerce by virtue of their relation-

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ship thereto. *Kirschbaum* v. *Walling*, 316 U. S. 517, *Walton* v. *Southern Package Corp.*, 320 U. S. 540, *Engebretsen* v. *E. J. Albrecht Co.*, supra; *Russell Co.* v. *McComb*, supra.

The defendant claims that the majority of the decisions relating to guards and watchmen were decided prior to the 1949 amendment when the pertinent statutory phrase of Section 3(j) read as follows: "or in any process or occupation necessary to the production thereof." These decisions, therefore, are not applicable under the present restricted amendment. This contention cannot be sustained. The legislative history of the amendment clearly indicates that there was no intention to overturn the existing law and exclude this class of employees from coverage by the Act. A careful examination also indicates that the amendment is expressed in the language of the
183 *Kirschbaum* case. The traditional and prevailing view on this class of employees was adopted in the case of *Russell Co., Inc.* v. *McComb*, supra, decided after the amendment.

At the defendant's central office, the bookkeeper handles every phase of the defendant's payroll for its employees at each Goldblatt establishment including Indiana. She also prepares cash disbursement reports covering the defendant's operations in every Goldblatt establishment. The statement clerk receives and maintains records regarding the arrest of shoplifters and dishonest employees at all Goldblatt establishments. She relays to the guards any information she might have at the time of arrest, and checks prospective Goldblatt employees against these records. Finally, the statement clerk prepares a monthly statement of arrests and goods returned, and submits it to Goldblatt. Both use the mails extensively in carrying out these duties. Until April 1, 1951, the switchboard operator handled all calls, including the calls to Indiana stores. She transmitted information relative to shipments across the state lines as well as bad checks cashed at all Goldblatt stores and warehouses. Since that date, these duties are being performed by the bookkeeper and statement clerk.

The interstate telephone activity of these three employees as well as the interstate use of the mails by the bookkeeper and the statement clerk in order to conduct the defendant's business throughout the entire Goldblatt enterprise is an engagement in interstate commerce, thereby bringing these employees within the provisions of the

Act. Furthermore, their employment activities effectuate the coordination, integration and orderly administration of the defendant's protection service at the warehouses, where there is production of goods for commerce. Since these accomplishments are as important to the service as the very acts of protection, these employees are engaged in a "closely related process or occupation directly essential to the production thereof." *Borden* v. *Borella*, 325 U. S. 679.

The defendant's fire inspector works out of the 184 central office. He inspects all Goldblatt stores and warehouses to insure compliance with the regulation of insurance association underwriters to prevent cancellation of insurance and to obtain compliance with the city fire ordinance. He inspects the Indiana stores biweekly, the warehouses weekly. He inspects fire extinguishers and sees that they are properly loaded at all times. He supervises two fire drills a year at each Goldblatt establishment.

The inspector's activities at the warehouses contribute so materially to interstate commerce as to be a part of it. This and his interstate travel places him in interstate commerce, and, therefore, within the Act. His activities at the warehouses, where there is production of goods for commerce, is directly essential to the production thereof. His duties are as important to fire protection as the actual guarding against fire itself. Compare *Walton* v. *Southern Package Corp.*, supra.

The defendant's employees are not exempt under the provisions of Sec. 13(a)(1), which exempts those employed in a bona fide executive, administrative, professional capacity or local retailing capacity or in the capacity of outside salesmen. Their duties do not meet the requirements, which have been set down by the Administrator. Regulations, Part 541. They do not render professional or sales services. They have nothing to do with management policies. These employees are performing the routine tasks of assisting in the general administration of the defendant's business. Furthermore, the defendant's employees are not employed in a "local retailing capacity," as the term is defined by the Administrator. Their duties do not consist of the making of retail sales nor of the performance of work immediately incidental to such retail sales, such as the weighing, wrapping or the delivery of merchandise to a customer. Explanatory Bulletin Regulations Part 541.401.

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The defendant's employees are not exempt as a "retail or service establishment" under the provisions of Section 13 (a) (2) of the Act. They are not engaged in the
185 sale of goods nor are they employed in or by a retail establishment. They are not engaged in that type of "service" to which the exemption refers, namely, a service "performed by establishments which are traditionally recognized as local retail service establishments such as the restaurant, hotel, barber shop, repair shops, etc." Interpretative Bulletin Sec. 779.7. It is significant that the aforementioned Administrator's Bulletin, based upon his experience, legislative history and judicial decisions, does not classify an establishment of the defendant's type as retail. Section 779.10. The Courts may properly look to these bulletins for guidance. *Skidmore* v. *Swift & Co.* 323 U. S. 134.

The plaintiff's prayer for reparation by the defendant to its employees in the amounts due to them by reason of the defendant's violations of the Act is denied because the Court does not have jurisdiction of these matters in this proceeding for an injunction. 29 U. S. C. A. 217.

An appropriate decree will be entered in favor of the plaintiff.

The plaintiff, having served copies thereof upon the defendant, will present detailed findings of fact and conclusions of law and an appropriate decree in open Court on April 6, 1953, at 10:00 A. M.

(Signed) J. S. Perry,
Judge.

186 And afterwards, to wit, on the 24th day of April, 1953, being one of the days of the regular February terms of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable J. Sam Perry, District Judge, appears the following entry, to wit:

187 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1558) * *

ORDER OF SUBSTITUTION OF PLAINTIFF.

It being represented to this Court that on January 21, 1953, Martin P. Durkin succeeded Maurice J. Tobin, Secretary of Labor, United States Department of Labor, and

thereby Martin P. Durkin succeeded Maurice J. Tobin, plaintiff in this cause, in the performance of his functions under the provisions of the Fair Labor Standards Act of 1938, as amended, Title 29 U. S. C., Section 201, et seq.; and that there is a substantial need for continuing and maintaining the above-entitled action and obtaining a final adjudication of the questions involved therein; and that with the consent of all parties hereto it is

Ordered that Martin P. Durkin, Secretary of Labor, United States Department of Labor, be, and he hereby is, substituted as plaintiff herein in place of Maurice J. Tobin without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by the said Martin P. Durkin as successor to Maurice J. Tobin.

Dated: Feb. 24, 1953.

J. S. Perry,
United States District Judge.

Entry of this order is hereby consented to and notice of entry thereof is waived.

Stanford Clinton,
Jay A. Pritzker,
Attorneys for Defendant.
William S. Tyson,
Solicitor,
Herman Grant,
Regional Attorney,
Ruth Provus,
Attorney,
Attorneys for Plaintiff, United States Department of Labor.

188 And afterwards, to wit, on the 7th day of May, 1953, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable J. Sam Perry, District Judge, appears the following entry, to wit:

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189 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1558) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The Court, having considered the pleadings, the stipulations of the parties and exhibits submitted therewith, the oral testimony and the briefs submitted by respective counsel, being fully advised in the premises and having entered its memorandum decision which is incorporated herein and made a part hereof, does hereby now make and enter, pursuant to Rule 52 of the Federal Rules of Civil Procedure its further Findings of Fact and Conclusions of Law as follows:

Findings of Fact.

1. The defendant, Joyce Agency, Inc., is an Illinois corporation with its central office at 343 South Dearborn Street, Chicago, Illinois. It is engaged in the business
190 of furnishing watchmen, guard, detective, fire inspection, and shopping service to Goldblatt Bros., Inc.

2. Goldblatt Bros., Inc., hereinafter called "Goldblatt," operates a chain of fourteen retail department stores, of which ten are in the city of Chicago and one in each of the cities of Joliet, Illinois; Hammond, Gary, and South Bend, Indiana. The total sales volume of all Goldblatt's stores for the fiscal years ending January 31, 1950 and January 31, 1951, was $90,120,214 and $94,957,514, respectively. Of these amounts, $17,369,674 for the fiscal year 1950 and $18,913,500 for the fiscal year 1951 represent sales by Goldblatt's stores in Hammond, Gary, and South Bend, Indiana.

3. Goldblatt maintains a motor transportation system consisting of 127 trucks, 70 trailers, and 17 tractors.

4. Goldblatt maintains in Chicago, Illinois, warehouses at:

3913 Wentworth Avenue, hereinafter referred to as "Wentworth Warehouse"

3161 South Ashland Avenue, hereinafter referred to as "Ashland Warehouse and Garage"

201 East 63rd Street, hereinafter referred to as "63rd Street Warehouse"

328 South Wabash Avenue, hereinafter referred to as "Wabash Warehouse".

5. Approximately 70 per cent of the goods received at the Wentworth Warehouse is regularly and daily received in interstate commerce from points outside of the State of Illinois. Merchandise having a sales value of more than 30 million dollars was both received at this warehouse
191 and shipped to Goldblatt stores during each of the fiscal years ending January 31, 1950 and 1951. Approximately 20 per cent of the merchandise shipped from the Wentworth Warehouse is shipped to Goldblatt's stores in Hammond, Gary, and South Bend, Indiana.

6. The goods handled at the Wentworth Warehouse are the "soft lines" and items of small bulk, including such merchandise as textiles, wearing apparel, furs, jewelry, small appliances, cameras and photographic equipment, sporting goods, chinaware and glassware, cigarettes and tobaccos, automobile supplies and tires, toys, lamps, pictures, mirrors, stationery, paper products, typewriters, bedding, shoes, rubbers, and drugs.

7. Goldblatt employs approximately 150 persons at the Wentworth Warehouse in the receiving, unloading, checking, unpacking, storing, handling, assembling, repacking, transporting to "store runs," distributing, and shipping of merchandise to Goldblatt's department stores.

8. Goldblatt employees at the Wentworth Warehouse daily receive, unload, and check incoming goods, 70 per cent of which goods is received in interstate commerce from points without the State of Illinois. The receiving department employees deposit these goods on the receiving platform and on freight elevators adjacent to and opening onto the railroad siding. Shipments from 50 to 60 trucks and trailers are received daily and an average of four railroad freight cars is received each week. "Break-bulk" ship-
192 ments, which are received daily, are taken after unloading directly from the receiving platform to the shipping platform for immediate forwarding to a particular Goldblatt store designated on the common carrier freight bill for such shipment. All other goods, after being unloaded, are moved to the various stock departments and are unpacked, counted, checked, marked, and placed in stock. Orders for all Goldblatt stores are filled from said stock departments in the following manner: The merchandise is picked from stock, placed in bins, checked and packed in containers, or placed on racks; sorted and checked by store, taken to the "store runs" on the shipping platform,

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from which they are loaded onto Goldblatt's trucks and trailers, and transported to Goldblatt's stores, including the three Indiana stores. Orders not completely picked or packed by quitting time are left in that incompleted state in their respective stock departments until the next working day. Assembled goods are left in the "store runs" until the next working day. Trucks or trailers which are loaded and sealed, partially loaded, or empty also remain in the warehouse until the next working day. An average of 75 Goldblatt trailers is loaded weekly at the shipping platform and of this number approximately 15 trailers a week go to Goldblatt's Indiana department stores. Goods are daily transported to Goldblatt's stores, including the stores in Hammond, Gary, and South Bend, Indiana.

9. Defendant employs four day guards and four night watchmen to guard the Wentworth Warehouse against fire, theft, or other casualty or damage to Goldblatt's physical property or goods. The duties of these employees are set forth with greater particularity in findings 10, 11, 12, 13, and 14 hereof.

193 10. One day guard is employed by defendant in the receiving department of the Wentworth Warehouse. He maintains a close watch over all the operations at the receiving platform, guards the goods throughout their receipt, unloading, and checking by Goldblatt's employees, and excludes unauthorized persons or persons other than the unloaders and checkers from the receiving platform. In the morning he unlocks the nine receiving doors at the receiving platform, the twelve steel doors in the shipping department, and the fire doors on all floors of the warehouse. He locks and unlocks the receiving doors before and after the lunch period, and again locks them at the end of the Goldblatt working day. He also relieves the defendant's shipping department guard for lunch. On every third Saturday he is also employed from 7 a. m. till 5 p. m. at the 63rd Street Warehouse, as described in finding 31 hereof.

11. A second day guard is employed by defendant in the shipping department of the Wentworth Warehouse. He maintains a close watch over all the operations on the shipping platform, guards the twelve steel doors in the shipping department to make certain that unauthorized persons do not enter or leave the warehouse through these doors, and watches goods in the "store runs." He guards the

Goldblatt trailers and trucks as they are being loaded, and after the truck or trailer is locked and sealed by Goldblatt's employees, defendant's shipping department guard checks the locks and seals on the side and rear before he permits the vehicle to depart. In addition, he guards shipments of "valuable goods" (goods particularly susceptible to theft, such as, cigarettes, furs, jewelry, guns, and
194 nylon hosiery), taking personal custody of these goods at a designated place on the shipping platform, guarding them at all times while they are on the platform and throughout the loading process until the trailer is locked and sealed, and then preparing a shipment memorandum listing the nature of the goods being shipped, department number, number of pieces, bill number, trailer number, and seal number. He gives this memorandum to the defendant's Wentworth Warehouse front door guard, who transmits this information to defendant's guard or special service man stationed at the Goldblatt store to which the goods are being shipped. It is also the duty of defendant's shipping department guard to admit to the shipping platform all incoming trucks and trailers, and examine the seals on both sides and rear of all incoming Goldblatt trucks and trailers to see that they are intact. If a seal is not in order, this guard telephones the defendant's detective or special service man at the place of origin, including the Indiana stores. This guard is also charged with seeing that the twelve steel doors are locked.

12. A third day guard of defendant is stationed at the "front door" of the Wentworth Warehouse, through which all Goldblatt employees enter and leave. This guard admits the United States mailman three times a day to deliver mail to the Goldblatt mail clerk at the Wentworth Warehouse. He checks all packages being carried out the front door. When a Goldblatt trailer or truck leaves the Wentworth Warehouse for a Goldblatt store too late to arrive before closing time, this guard relays the information by telephone to defendant's switchboard operator in defendant's central office and the switchboard operator telephones the information to the defendant's detective or
195 special service man at the Goldblatt store involved, notifying him that the trailer will arrive late and is to be received. Defendant's front door guard is notified by defendant's central office of persons who will remain in or who will enter the Wentworth Warehouse after closing

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time. This information is entered on a watchman's log by the front door guard for the use of defendant's night watchmen.

13. A fourth day guard of defendant is employed as the head house detective at the Wentworth Warehouse. He is in charge of all the defendant's day guards at this warehouse and is responsible for protecting during the day the buildings composing the Wentworth Warehouse, the merchandise therein, and the operations carried on therein. He patrols the entire warehouse guarding against fire, theft, and other hazards. At the warehouse closing time he makes certain that the time clock on the front door is set and in operating order. He checks the time clock tape to see that the night watchmen have made all proper stations during the night, and is responsible for preserving the tapes for inspection by the Cook County Inspection Bureau, which approves or disapproves the security measures taken by insurance policyholders and, upon the basis of its findings, determines whether the policyholders shall be permitted to continue their insurance, whether premium discounts shall be allowed, or whether additional premiums shall be charged. The head house detective has charge of the supply of seals used by the entire Goldblatt system to seal trucks and trailers, regularly supplies seals to each of the various stores and warehouses for their use, keeps a record of the seals, and requisitions a new supply of seals when required. He apprehends dishonest em-
196 ployees or strangers, makes a record and report of any arrest or incident to the defendant's central office, and prepares a monthly report of stolen goods recovered and restitution paid in connection with thefts. He relieves any of the day guards whenever occasion requires, and prepares the records of hours worked daily and salary rate for all defendant's day guards and night watchmen working at the Wentworth Warehouse.

14. There are two 2-man crews of night watchmen employed by defendant at Wentworth Warehouse, one crew working the early shift and the other the late shift. These night watchmen patrol the entire warehouse making hourly rounds of twenty key stations. They guard the goods in the warehouse in all stages of being received, handled, stored, and prepared for shipment, including the goods enroute to the shipping platform and on the receiving and shipping platform. In the shipping department they also guard

the partially-loaded trailers and trucks and trailers that may be locked and sealed. They also look out a nearby window to detect prowlers on or in the vicinity of the railroad cars and notify the city police if they detect any prowlers around the freight cars or warehouse.

15. Approximately 65 per cent of the goods received at the Ashland Warehouse and Garage is regularly and daily received in interstate commerce from points outside the State of Illinois. Merchandise having a sales value of more than 12½ million dollars was both received at this warehouse and shipped to Goldblatt stores or to customers thereof during each of the fiscal years ending Janu-
197 ary 31, 1950 and 1951. Approximately 20 per cent of the merchandise shipped from the Ashland Warehouse and Garage is regularly and daily shipped to Goldblatt's stores or customers in Hammond, Gary, and South Bend, Indiana.

16. The goods handled at the Ashland Warehouse and Garage are the "hard lines" or "bulk merchandise" including such merchandise as rugs, carpets, linoleum, springs and mattresses, refrigerators, sewing machines, radio and television sets, electric and gas ranges, washing machines, and furniture of almost every description, including studio couches and folding beds.

17. Goldblatt employs approximately 150 persons at the Ashland Warehouse and Garage in the receiving, unloading, checking, unpacking, storing, handling, assembling, repacking for delivery, servicing, transporting to runs, distributing, and shipping of merchandise to Goldblatt's department stores and customers thereof.

18. At the truck and railroad receiving platform of the Ashland Warehouse and in the garage warehouse building in the Ashland Garage, Goldblatt employees are engaged daily in receiving, unloading, and checking incoming goods and depositing them on the platforms or floor of the garage warehouse building. Approximately 65 per cent of these goods is received in interstate commerce from points without the State of Illinois. The incoming goods, after being unloaded and checked, are moved to stock departments in the warehouse. When orders are filled, merchandise is picked from stock, hauled to the appropriate run be-
198 hind the shipping and loading platform, loaded onto Goldblatt trucks and trailers, and transported either to Goldblatt stores, including the three Indiana stores, or

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to customers of Goldblatt stores, some via the Hammond and Gary delivery base. Between 15 and 25 trailerloads are shipped to Indiana weekly. Goods assembled in the runs, which have not been loaded onto trucks and trailers by quitting time, remain in the runs until the next working day. Similarly, trucks or trailers which are loaded and sealed, or partially loaded, or empty, remain in the warehouse until the next working day.

19. Goldblatt employs approximately 30 employees at the Ashland Warehouse in the furniture renovating shop reconditioning, upholstering, repairing, assembling, refinishing, and polishing furniture. Fifty Goldblatt employees are employed in the radio and television clinic in removing television and radio sets from their cases and repairing sets. Twelve Goldblatt employees are employed in the carpet and linoleum department in cutting, serging, edging, and binding carpets and in cutting linoleum. Four employees are employed in unpacking sewing machines and accessories, testing sewing machines, and installing them in cabinets and portable cases. These operations are performed on merchandise for all of the Goldblatt stores and customers thereof, including those in Indiana. In the garage shop Goldblatt employs seven mechanics, one washer, and one tire changer in repairing, rebuilding, and maintaining Goldblatt's entire motor transportation fleet.

199 20. Defendant employs two day guards at the Ashland Warehouse and from four to six night watchmen to guard the Ashland Warehouse and Garage against fire, theft, or other casualty or damage. The duties of these employees are described with greater particularity in findings 21, 22, 23, 24, 25, and 26 hereof.

21. One day guard employed by defendant is stationed at the truck and railroad receiving platforms in the Ashland Warehouse. He guards both the truck and railroad receiving platforms, the checking, unloading, and depositing on the platform, by Goldblatt employees of all goods received in 50 or 60 trucks and trailers daily and eight freight cars weekly. He excludes unauthorized persons from the receiving platforms and enforces the "No Smoking" regulations. He unlocks and locks the six truck receiving doors at the beginning and end of the workday and at the lunch period. He checks the fire doors to see that they are not blocked and will operate.

22. A second day guard employed by defendant is stationed in the guard booth near the truck pit in the shipping department for the Ashland Warehouse and Garage. He guards the ingress and egress of all persons, motor trucks and trailers, and goods to and from the shipping platform. He operates the electrically controlled doors and lets trucks in and out. He guards the loading of goods. As each Goldblatt trailerload is completed, he locks the trailer, affixes metal seals on the trailer side and rear, and then records the number of the seals, the trailer number, and time of departure, and the destination of shipment of the out-
200 going trailer. Between three and five trailers leave the shipping platform daily for Indiana. The defendant's guard checks incoming Goldblatt trailers, removes the seals from the rear and side doors, records the seal number, the trailer numbers, time of arrival, point of origin, and whether the trailer carried a shipment. An average of three to five Goldblatt trailers is received each day from Indiana. The guard makes and receives telephone calls regarding shipments to and from all Goldblatt establishments, including the Indiana stores. He receives and sorts inter-office mail and United States mail for the Ashland Warehouse and Garage. He also prepares the records of hours worked daily and salary rate for all defendant's day guards and night watchmen working at the Ashland Warehouse and Garage, and submits these records weekly to defendant's main office where the records are completed.

23. Until February 1, 1951, defendant stationed a day guard in the guard's booth at the garage entrance of the Ashland Garage. The guard controlled the ingress and egress of trucks and trailers entering or leaving the garage by means of an electrically controlled garage door. He recorded the time of entry of all incoming Goldblatt trailers admitted through this garage door, and broke the seals on the trailers if they were to be unloaded. He was also required to seal, front and side, all Goldblatt trailers leaving the Ashland Garage; to make a record of the seal numbers, the time of departure, and destination of the trailer. He enforced the "No Smoking" regulation. At the end of a half day's work this guard exchanged posts with the day guard stationed at the receiving platform
201 described in finding 21 hereof. Since February 1, 1951, the duties of this guard have been performed by a Goldblatt employee.

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24. Defendant has a night watchman stationed in the guard booth near the truck pit in the shipping department for the Ashland Warehouse and Garage. This is the same station manned by the day guard described in finding 22 hereof. From 5 p. m. to 9 p. m., nightly, he operates the electrically controlled doors to admit incoming Goldblatt trucks and trailers from all Goldblatt establishments, checks and records their arrival, point of origin, seal numbers, and whether loaded or empty. At about 9 p. m., after the last trailer and truck are checked in and drivers checked out, this watchman patrols the entire Ashland Warehouse making hourly rounds of twelve key stations, guarding all goods that are in various stages of receipt, storage, and preparation for shipment, and all doors and other possible means of entry into the warehouse. At the truck and railroad receiving platforms, he checks the six receiving doors and guards the railroad freight cars which may be loaded, partially loaded, or empty. During the night, as occasion requires, he opens the railroad doors and receives freight cars which come in at the rate of about eight cars a week; records the time of arrival, serial number of cars, and name of railroad company; remains on the railroad receiving platform during the entire time the railroad crew is in the train shed; and before permitting the removal of empty freight cars, inspects them to see that no goods are left in them.

25. Defendant has a night watchman stationed in
202 the guard's booth at the garage entrance of the Ashland Garage. Between 5 p. m. and 10 p. m. his duties are as follows: By means of an electrically controlled garage door, he controls the ingress and egress of trucks and trailers entering or leaving the garage. He records the time of entry of all incoming Goldblatt trailers admitted through this garage door, and breaks the seals on the trailers if they are to be unloaded. He is also required to seal, front and side, all Goldblatt trailers leaving the Ashland Garage, to make a record of the seal numbers, the time of departure, and destination of the trailer. At about 10 p. m., after the last truck or trailer is checked in and parked, this guard locks the guard's booth and begins his hourly rounds of seven key stations so located as to require him to cover the entire Ashland Garage, guarding all goods in various stages of receipt, storage, and preparation for shipment; all trucks and trailers in the garage; and all doors and other possible means of entry into the ware-

house. Between rounds he also opens the doors and checks in or out persons, trailers, or trucks, as emergencies require, and at about 5 a. m. checks out a Goldblatt truck carrying advertising material to the Indiana store.

26. For approximately three months during the late winter and spring, defendant has a night watchman stationed in the rear of the east loading building of the Ashland Garage. This watchman guards shrubs, plants, fertilizer, and garden goods stored under a large canvas or tent against theft, wind, fire, and other hazards. He guards against possible theft by train crews engaged
203 in delivering and picking up railroad freight cars at the train shed, or in spotting such cars in the rear of the building. He also guards the freight cars spotted on the outside of the train shed. He makes clock stations consecutively.

27. Approximately 50 per cent of the goods received at the 63rd Street Warehouse is regularly and daily received in interstate commerce from points outside the State of Illinois. Merchandise having a sales value of more than 10 million dollars was both received at this warehouse and shipped to Goldblatt stores during each of the fiscal years ending January 31, 1950 and 1951. Approximately 17 per cent of the goods shipped from the 63rd Street Warehouse is regularly and daily shipped to Goldblatt stores in Hammond, Gary, and South Bend, Indiana.

28. The goods handled at this warehouse are groceries, liquors, beer, candies, and cookies, as well as garden tools and pet shop supplies. During the 12-month period ending January 31, 1950, Goldblatt sold $17,207,154 worth of food products in all of its retail stores; of this amount, in excess of 10 million dollars represents food products which were handled and shipped from the 63rd Street Warehouse. Liquors and beer are not shipped to Indiana stores.

29. Goldblatt employs approximately 26 persons at the 63rd Street Warehouse in the receiving, unloading, checking, unpacking, storing, handling, assembling, packaging, packing, transporting to "store runs," distributing, and shipping of goods to Goldblatt stores.

204 30. Goldblatt employees at the 63rd Street Warehouse daily receive, unload, check, and deposit goods on the truck and railroad receiving platform, 50 per cent of which is received in interstate commerce from points without the State of Illinois. Shipments from 25 to 30

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trucks and trailers are daily received at the truck receiving platform, and an average of three freight cars per week at the railroad receiving platform. The goods, after being unloaded, are moved to the appropriate stock department. Merchandise is picked from stock as required by the particular Goldblatt store order, then checked, packed in containers, transported to the appropriate "store run," loaded onto Goldblatt trucks and trailers, locked and sealed, and thereafter transported to the Goldblatt store. Orders not completely picked or packed by quitting time are left in that incompleted state in their respective stock departments until the next working day; assembled goods are left in the "store runs"; and trucks and trailers which are loaded and sealed, or partially loaded or empty remain in the truck pit until the next working day.

31. Defendant has a night watchman stationed at the 63rd Street Warehouse. Two regular night watchmen and one or more relief watchmen are employed at this warehouse but only one night watchman is on duty at any one time. The night watchman makes hourly key clock rounds covering the entire 63rd Street Warehouse, including the receiving and shipping platform. On every round during approximately eight months of the year he checks the boiler which heats the whole building. On his rounds he guards all goods in all stages of being received, stored, handled, and prepared for shipment, including those goods on the platform and in the motor trucks and trailers, the trucks and trailers, themselves, and all doors, windows, skylights, ventilators, and other means of entry into
205 the warehouse, particularly the roof, to see that freight cars are not used as a means of ingress. He watches the interstore mail, and ingress and egress thereof.

32. Approximately 22 per cent of the incoming goods received at the Wabash Warehouse is regularly and daily received in interstate commerce from points outside the State of Illinois. Merchandise having a sales value of more than 18 million dollars was received at this warehouse during each of the fiscal years ending January 31, 1950 and 1951. Approximately 2 per cent of the goods shipped from this warehouse is regularly and daily shipped to Goldblatt's customers located outside the State of Illinois, the sales value of these shipments totaling approximately $180,000 during each of the fiscal years ending January 31, 1950 and 1951.

33. Goldblatt employs approximately 69 persons at the Wabash Warehouse in the receiving, unloading, checking, unpacking, marking, storing, repacking, wrapping, distributing, and shipping of goods to Goldblatt State Street Store customers.

34. Goldblatt employees at the Wabash Warehouse daily receive, unload, check, and deposit incoming goods on the receiving and shipping platform, 22 per cent of which is received in interstate commerce from points without the State of Illinois. Thereafter the goods are moved by Goldblatt employees either to marking rooms or warehousing space in the warehouse. Mail orders, most of which are
received from customers outside the State of Illinois,
206 are filled in the following manner: Goods are selected,
wrapped, and labeled in the State Street Store, delivered to the shipping room in the Wabash Warehouse for checking and affixing of postage, conveyed to the loading and shipping platform for loading onto a Goldblatt truck or trailer, and taken to the United States Post Office. Express shipments, made at the request of the customer, are handled in approximately the same manner as the mail orders, except that the express company's truck calls for the shipments. In handling outgoing goods sold at the State Street Store the package is wrapped and a delivery slip prepared, which is attached thereto. The package is then delivered to the Wabash Warehouse shipping room for checking and conveying to the loading and shipping platform, where it is loaded onto a Goldblatt truck and trailer, and taken to the Ashland Garage for sorting for delivery to Goldblatt customers. At least one trailer a day leaves the Ashland Garage for Indiana.

35. The defendant employs a day guard at the Wabash Warehouse, who is stationed at the receiving and shipping platform and in the alley between Jackson Boulevard and Van Buren Street. His duty is to guard against theft or any other damage to goods and vehicles, either being received at or shipped from the Wabash Warehouse. This day guard keeps the alley clear of traffic; directs incoming trucks and trailers, carrying both local and interstate goods, through the alley and into the truck pit; and also directs all outgoing trucks and trailers from the truck pit
out of the alley. He examines the seals on all incoming
207 Goldblatt trailers. In the case of so-called "valuable"
goods, such as, furs, jewelry, hosiery, etc., received at

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the Wabash Warehouse, the day guard watches the unloading of such goods, and makes certain that the goods are received intact by the particular Goldblatt employee designated to receive said "valuable" merchandise. He also guards the incoming goods throughout the receiving, unloading, and checking process at the receiving platform. No trailer or truck is permitted to depart until the seals have been placed on the vehicles; it is the duty of the day guard to note the numbers of the trailers and authorize the departure of the trailers. The day guard also checks to see that all goods being shipped out of the warehouse are accompanied by either a trip sheet or door pass signed by an authorized Goldblatt employee; this includes express and parcel post shipments which are made daily in both intrastate and interstate commerce. He is also charged with the duty of preventing unauthorized persons from entering the Wabash Warehouse through the receiving or shipping platform.

36. Defendant employs approximately 10 employees in its central office at 343 South Dearborn Street, Chicago, Illinois. These employees perform the administrative work integrating defendant's furnishing of night watchman, guard, detective, fire inspection, and shopping service to Goldblatt. These central office employees hire, assign, and direct the work of all night watchmen, day guards, and detectives employed by defendant in all Goldblatt warehouses and stores, and maintain all the books and records in connection with defendant's business.

208 37. The bookkeeper employed by defendant at defendant's central office handles every phase of defendant's pay roll record for its employees at each Goldblatt warehouse and store, including the Hammond and Gary, Indiana, Goldblatt stores. She prepares and submits weekly to Goldblatt detailed cash disbursement reports, billing Goldblatt for the total detective, day guard, and night watchmen pay roll, plus 3.6 per cent of the gross for Social Security and Unemployment Compensation contributions. She makes the Social Security, Unemployment Compensation, and Withholding Tax returns and pays them to the State of Illinois, the State of Indiana, and the Collector of Internal Revenue. Each week she receives from all Goldblatt stores the records of hours worked daily for all of defendant's employees, and each week she makes up the pay checks and normally mails them to the Gold-

blatt establishment where defendant's employees are stationed, including the Hammond and Gary, Indiana, Goldblatt stores. The bookkeeper maintains individual earnings records for all defendant's employees. In addition to the foregoing duties, the bookkeeper has since April 1, 1951, four days per week, performed the duties of the switchboard operator, as described in finding 39 hereof.

38. The statement clerk employed in defendant's central office is engaged in receiving, recording, and transmitting information with respect to arrests made by defendant's detectives and day guards stationed in all Goldblatt stores and warehouses. Defendant's detectives and guards, upon arresting a shoplifter or dishonest em-
ployee, record information regarding the theft, the
209 circumstances surrounding it, and the person in-
volved, on forms provided for that purpose, and telephone this information to the statement clerk, who examines defendant's records and gives any information found therein concerning the person arrested to the detective or guard by telephone. The detective or guard then sends various records he has made in connection with such arrests to the statement clerk, who records such information on cards for defendant's files and acknowledges receipt of the documents from the detective or guard. She also prepares a do-not-hire card, if the arrest involves a Goldblatt employee, and delivers such cards almost daily to Goldblatt's State Street Store, from which point the information contained thereon is made available to all Goldblatt stores. Each month the statement clerk prepares and submits a statement to Goldblatt's showing the arresting detective or day guard, persons arrested, goods taken, and goods returned. In addition to the foregoing duties, the statement clerk has, since April 1, 1951, one day per week, performed the duties of the switchboard operator described in finding 39 hereof.

39. Until April 1, 1951 defendant employed a switchboard operator in the central office. Her duties since April 1, 1951 have been performed by the bookkeeper and statement clerk, as set forth in findings 37 and 38 hereof. The switchboard operator's duties are to handle all incoming and outgoing calls through the switchboard in defendant's central office, including all calls between defendant's
central office and defendant's employees stationed in
210 all Goldblatt warehouses and stores. Calls to and
from Goldblatt's Indiana stores occur daily. Tele-

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phone calls are received and made by the switchboard operator to arrange for the late arrival of a trailer at a Goldblatt establishment. Defendant's employee stationed at the trailer's point of departure telephones the switchboard operator to notify her that a trailer left too late to arrive before closing time at the Goldblatt establishment, which is its destination; she then telephones the defendant's employee at the destination and notifies him of the trailer's late arrival. She also receives and makes telephone calls to arrange for late opening of the door at a Goldblatt establishment. A Goldblatt executive notifies her by telephone that it is necessary for a person to remain in or enter a Goldblatt establishment after closing hours; she then telephones this information to defendant's employee at the establishment involved, and records information regarding the late opening in a book kept at the switchboard. She also receives information by telephone from defendant's detectives regarding the cashing of a bad check in a Goldblatt store, and she in turn telephones such information to defendant's detectives in all Goldblatt's stores, including the Indiana stores. Employees in defendant's central office also make calls to and receive calls from points in States other than Illinois and Indiana, depending on the circumstances of the business.

40. Defendant's fire inspector works out of the central office. He inspects all Goldblatt stores and warehouses to insure compliance with the rules and regulations of insurance association underwriters to prevent cancellation of insurance and to obtain compliance with the city fire ordinances. He inspects the Indiana stores biweekly; 211 the warehouses, weekly. He inspects fire extinguishers to see that they are properly loaded at all times. He supervises two fire drills a year at each Goldblatt establishment. He makes daily reports to the office manager. He is subject to call at all times. From October 1, 1947 to about July 1, 1951 defendant employed a fire inspector who devoted full time to fire inspection duties. Since December 27, 1951 Bernard C. Poehler has performed the duties of the fire inspector as well as supervised the watchmen. He spends between 30 and 35 per cent of his working time in performing fire inspection duties. He is on call for fire inspection duties 24 hours a day.

41. Goldblatt carries insurance on the building and contents of the Wentworth Warehouse, the Ashland Ware-

house and Garage, and the 63rd Street Warehouse, as follows:

	Fire and Extended Coverage Insurance on Building	Fire and Extended Coverage Insurance on Contents of Building	Sprinkler Leakage Ins. on Building	Sprinkler Leakage Ins. on Contents of Building	Internal and External Hold-up Insurance
Wentworth Warehouse	$ 929,000	$3,000,000	Included in fire and extended coverage policies		$ 6,000—Int. 1,000—Ext.
Ashland Warehouse and Garage	1,910,000	1,750,000	"	"	50,000—Int. 1,500—Ext.
63rd Street Warehouse*	245,000	900,000	None	None	25,000—Int. 1,000—Ext.

* In addition, at the 63rd Street Warehouse there is open stock burglary insurance in the amount of $50,000 covering only the liquor stored in the vault.

It is the practice of fire insurance companies to graduate the rate charged for fire insurance in accordance with the degree of risk presented. As a general rule, the plant which maintains a night watchman making hourly
212 rounds is accorded a lower insurance rate than an identical plant which maintains no such watchman. The maintenance of night watchmen making hourly rounds of key stations in the Wentworth Warehouse, the Ashland Warehouse and Garage, and the 63rd Street Warehouse has resulted in Goldblatt obtaining a lower insurance rate than would have been possible without the aforesaid night watchmen. At the Wentworth Warehouse the premium savings approximate 5 per cent, or $46.45, on the building, and 4 per cent, or $150.00, on the contents of the building. At the 63rd Street Warehouse the premium savings approximate 5 per cent, or $15.60 on the building, and 3 per cent, or $270.00, on the contents thereof. At the Ashland Warehouse and Garage the premium savings approximate 2 per cent, or $19.10, on the building, and 1 per cent, or $17.50, on the contents thereof. There are a number of other factors which affect Goldblatt's fire insurance premiums, including the location of buildings, the construction of buildings, the presence or absence of a sprinkler system, and the kind of merchandise offered.

Goldblatt carries insurance on the transportation of goods by its motor fleet consisting of 127 trucks and 70 trailers drawn by 17 tractors. The ability to obtain this

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insurance is affected by the security measures used by defendant's employees and Goldblatt employees. This is true with regard to the practice of sealing Goldblatt vehicles and keeping records of the seals, as described herein.

42. Since October 1, 1947 the defendant has failed to pay its watchmen, guards, and detectives employed at the Wentworth Warehouse, Ashland Warehouse and Garage, 63rd Street Warehouse, and Wabash Warehouse, as well as the statement clerk, bookkeeper, switchboard operator, and fire inspector employed at its central office, overtime compensation at the rate prescribed in Section 7 of the Fair Labor Standards Act of 1938, as charged in paragraph XI of the complaint.

213 Conclusions of Law.

1. The Court has jurisdiction of the parties and the subject matter of this cause of action pursuant to the provisions of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. ti. 29, sec. 201 et seq., as amended, 63 Stat. 910), hereinafter called the Act.

2. The plaintiff herein, Martin P. Durkin, is the Secretary of Labor, United States Department of Labor. As a result of Reorganization Plan No. 6, dated March 13, 1950, effective May 24, 1950, issued under the Reorganization Act of 1949, Title 5 U. S. C., Section 133(z) et seq., the functions of the Administrator of the Wage and Hour Division under the Fair Labor Standards Act of 1938, as amended, have been transferred to the Secretary of Labor.

3. The defendant's watchmen, guards, and detectives employed at the Wentworth Warehouse, Ashland Warehouse and Garage, 63rd Street Warehouse, and Wabash Warehouse, as well as defendant's statement clerk, bookkeeper, switchboard operator, and fire inspector employed at its central office, are engaged in commerce and in the production of goods for commerce within the meaning of Sections 3(j) and 7 of the Act, as amended.

4. The exemption provided by Section 13(a)(1) of the Act with respect to any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman is inapplicable to defendant's watchmen, guards, and detectives employed at the Wentworth Warehouse, Ashland Ware-

house and Garage, 63rd Street Warehouse, and Wabash Warehouse, as well as defendant's statement clerk, bookkeeper, switchboard operator, and fire inspector employed at its central office.

214 5. The exemption provided by Section 13(a)(2) of the Act with respect to any employee employed by any retail or service establishment is inapplicable to defendant's watchmen, guards, and detectives employed at the Wentworth Warehouse, Ashland Warehouse and Garage, 63rd Street Warehouse, and Wabash Warehouse, and defendant's statement clerk, bookkeeper, switchboard operator, and fire inspector employed at its central office.

6. The defendant's employee Bernard C. Poehler, described in Finding No. 40, is engaged in commerce and in the production of goods for commerce within the meaning of Sections 3(j) and 7 of the Act, as amended.

7. The exemption provided by Section 13(a)(1) of the Act with respect to any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman is inapplicable to defendant's employee Bernard C. Poehler, described in Finding No. 40, who is supervisor of the watchmen, but who devotes between 30 and 35 per cent of his working time in performing fire inspection duties, and is on call for fire inspection 24 hours per day.

8. The exemption provided by Section 13(a)(2) of the Act with respect to any employee employed by any retail or service establishment is inapplicable to defendant's employee Bernard C. Poehler, described in Finding No. 40.

9. The defendant has violated Sections 7 and 15(a)(2) of the Act, as amended, and, pursuant to Section 17 of the Act, plaintiff is entitled to an order restraining the defendant from violating Section 15(a)(2) of the Act, with costs to be taxed by the Clerk of the Court.

215 10. The Court has no jurisdiction under Section 17 of the Act to order defendant to make reparation to its employees in the amounts due to them by reason of the violations of the Act.

Let judgment be entered in accordance with the Findings of Fact and Conclusions of Law.

Dated: May 7, 1953.

J. S. Perry,
United States District Judge.

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216 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1558) * *

JUDGMENT.

Plaintiff having filed his complaint, and the defendant having appeared by counsel and having filed its answer to said complaint, and the Court having considered the evidence and the briefs of the respective parties, and having made and entered appropriate Findings of Fact and Conclusions of Law, and sufficient reasons therefor appearing.

Now, therefore, upon motion of the attorneys for plaintiff, it is

Ordered, Adjudged, and Decreed that defendants, its officers, agents, servants, employees, attorneys, and all persons acting or claiming to act in its behalf and interest, be, and they hereby are, permanently enjoined and restrained from violating the provisions of Section 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; U.S.C. ti. 29, sec. 201 *et seq.*, as amended, 63 Stat. 910), hereinafter referred
217 to as the Act, in the following manner:

The defendant shall not, contrary to Section 7 of the Act, employ any of its employees engaged in commerce or in the production of goods for commerce, as defined by the Act for a workweek longer than 40 hours, unless the employee receives compensation for his employment in excess of 40 hours at a rate not less than one and one-half times the regular rate at which he is employed.

It is Further Ordered, Adjudged, and Decreed that the plaintiff recover of and from the defendant his costs and disbursements herein.

Dated: May 7, 1953.

J. Sam Perry,
United States District Judge.

218 And afterwards on, to wit, the 1st day of July, 1953 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal and Bond for Costs on Appeal in words and figures following, to wit:

219 IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

Martin P. Durkin, Secretary of Labor,
Plaintiff,
vs.
Joyce Agency, Inc., a corporation,
Defendant.
Civil Action
No. 49 C 1558.

NOTICE OF APPEAL.

Notice is hereby given that Joyce Agency, Inc., a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment enjoining the defendant, its officers, agents, servants, employees, attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Section 15(a)(2) of the Fair Labor Standards Act of 1938, as amended, said judgment having been entered in this action on May 7, 1953.

Stanford Clinton,
Attorney for Appellant,
134 North LaSalle Street,
Chicago, Illinois,
Robert A. Sprecher,
Attorney for Appellant,
100 West Monroe Street,
Chicago, Illinois.

Dated: July 1, 1953.

(Certificate of Mailing Attached Hereto):

220 United States of America,
Northern District of Illinois. } ss:

* * (Caption—49-C-1558) * *

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on July 1, 1953, in accordance with Rule 73(b) of

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the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to: William S. Tyson, Herman Grant and George Faris, 105 West Adams Street, Chicago 3, Illinois.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court, at Chicago, Illinois, this 1st day of July, 1953.

Roy H. Johnson,
Clerk.

(Seal)

By Gizella Butcher,
Deputy Clerk.

221 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1558) * *

BOND FOR COSTS ON APPEAL.

Know All Men By These Presents That we, Joyce Agency, Inc., a corporation, as principal, and The Travelers Indemnity Company as surety, are held and firmly bound unto Martin P. Durkin, Secretary of Labor, the plaintiff, in the sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said Martin P. Durkin, his successors and assigns, to which payment we bind ourselves, our successors and assigns, jointly and severally.

The condition of this bond is that, whereas the defendant has appealed to the Court of Appeals for the Seventh Circuit by notice of appeal filed July 1, 1953, from the judgment of this court entered May 7, 1953, if the defendant shall pay all costs adjudged against him if the appeal is dismissed or the judgment affirmed, or such costs as the Court of Appeals may award if the judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

Joyce Agency, Inc.,
By Robert Gerlich,
President,

The Travelers Indemnity Company, (Seal)
By William Davies,
Attorney-in-Fact.

Attest:
G. Holter,
(Seal) *Secretary.*

222 State of Illinois, } ss:
County of Cook. }

I, Robert A. Sprecher, a Notary Public in and for said County, in the State aforesaid, Do Hereby Certify that Robert Gerlich, personally known to me to be the President of Joyce Agency, Inc., and G. Holter, personally known to me to be the Secretary of said corporation, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that as such President and Secretary, they signed and delivered the said instrument as President and Secretary of said corporation, and caused the corporate seal of said corporation to be affixed thereto, pursuant to authority, given by the Board of Directors of said corporation as their free and voluntary act, and as the free and voluntary act and deed of said corporation, for the uses and purposes therein set forth.

Given under my hand and notarial seal this ..... day of July, 1953.

Robert A. Sprecher,
(Seal) *Notary Public.*

State of Illinois, } ss:
County of Cook. }

I, ..., a Notary Public in and for said County, in the State aforesaid, Do Hereby Certify that ....., personally known to me to be the ..... of the .....
223 appeared before me this day in person and acknowledged that as such ..... he signed and delivered the said instrument, pursuant to authority given him by said ....., as his free and voluntary act and as the free and voluntary act and deed of said ....., for the uses and purposes therein set forth.

Given under my hand and notarial seal this ..... day of ....., 1953.

.....
Notary Public.

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State of Illinois, } ss:
County of Cook. }

On this 1 day of July, 1953, before me personally came William Davies to me known, who being by me duly sworn, did depose and say: that he is Attorney(s)-in-Fact of The Travelers Indemnity Company, the Corporation described in and which executed the foregoing instrument; that he know(s) the seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it wa so affixed by authority granted to him in accordance with the By-Laws of the said Corporation, and that he signed his name thereto by like authority.

(Seal) LaVerne J. Milleville,,
(Seal) *Notary Public.*

My commission expires 9-24-55.

• • • • •

237 United States of America, }
Northern District of Illinois, } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: Martin P. Durkin, Secretary of Labor, Plaintiff, *vs.* Joyce Agency, Inc., a corporation, Defendant, No. 49-C-1558, as the same appear from the original records and files theerof now remaining among the records of the said Court in my office, except the Original Stipulation Of Facts and Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14-A, 14-B, 14-C, 14-D, 14-E, 14-F, 14-G, 14-H, and 15, filed November 13, 1951, which are incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 22nd day of July, 1953.

Roy H. Johnson,
Clerk.

(Seal)

By Gizella Butcher,
Deputy Clerk.

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At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and fifty-three, and of our Independence the one hundred and seventy-eighth.

No. 10936

JAMES P. MITCHELL, SECRETARY OF LABOR, PLAINTIFF-APPELLEE,

vs.

JOYCE AGENCY, INC., DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

And afterwards, to-wit: On the twenty-ninth day of March, 1954, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1953, JANUARY SESSION, 1954

No. 10936

JAMES P. MITCHELL, SECRETARY OF LABOR, PLAINTIFF-APPELLEE,

vs.

JOYCE AGENCY, INC., A CORPORATION, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

March 29, 1954

Before MAJOR, *Chief Judge*, SWAIM and SCHNACKENBERG, *Circuit Judges*

SCHNACKENBERG, *Circuit Judge*. This is an appeal by the defendant, Joyce Agency, Inc., from a judgment entered on May 7, 1953, by the United States District Court for the Northern District of Illinois, Eastern Division, finding that the defendant has violated sections 7 and 15(a) (2) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. §§ 201, *et seq.*, as amended, 63 Stat. 910), and ordering, pursuant to section 17, that the defendant be enjoined from further violating the provisions of section 15(a) (2) of the Act.

The question for decision is whether defendant's employees were engaged in interstate commerce or in the production of goods for

interstate commerce at four warehouses of Goldblatt Bros., and at defendant's central office, so as to bring them within the coverage of the act.

From the parties' stipulation of facts the following situation appears to have existed at all times hereinafter mentioned.

Defendant is an Illinois corporation with its central office at 343 South Dearborn Street, Chicago. It engages in the business of furnishing watchman, guard, detective, fire inspection and shopping service to Goldblatt Bros. Inc., hereinafter called "Goldblatt", and employs 72 persons.

Goldblatt owns and operates a chain of 14 retail department stores. Of these stores, 10 are in the city of Chicago and one in each of the cities of Joliet, Illinois, Hammond, Gary, and South Bend, Indiana. It has a central office in Chicago, Illinois, where the administrative work in connection with Goldblatt's organization is performed, including the purchase of various kinds of merchandise usually found in a large department store. To service its 14 department stores, Goldblatt maintains in Chicago, Illinois, warehouses at 3913 South Wentworth Avenue, 3161 South Ashland Avenue, 201 East 63rd Street, and 328 South Wabash Avenue. At these warehouses goods are received and stored and thereafter shipped to the defendant's various retail stores. Most of the goods received are from points outside Illinois and a substantial part of the goods shipped to retail stores is to those located in Indiana. At one of the warehouses, which is known as the Ashland warehouse, there are also a furniture renovating shop, a radio and television clinic, a carpet and linoleum department, and a sewing machine department, as well as a garage where nine persons are employed by Goldblatt in maintaining its motor transportation fleet.

Defendant's employees include guards and watchmen who guard the warehouses and their contents against all risks, including fire, and the loading and unloading of goods on the loading platforms of the warehouses, check all packages being carried out, keep records of the names of people working after closing hours for the use of the watchmen, open railroad doors to receive freight cars during the night, control ingress and egress of trucks in and out of the garage, and about 5 A. M. check out a truck carrying advertising material to the Indiana stores. Certain guards check the locks and seals on trucks before permitting them to unload or to leave the warehouses when loaded. Guards performing this particular service will be hereinafter referred to as the "seal-checking guards". Defendant's employees do not physically handle the goods received or shipped, except insofar as they may handle stolen goods recovered by them, valued at approximately $300.00 per year.

The furniture renovating shop reconditions, upholsters, repairs, replaces broken parts, assembles, refinishes and polishes furniture which has been damaged while on display in the stores or in transit.

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The clinic removes television and radio sets from their cases, repairs new, display and customers' sets. The carpet and linoleum department cuts carpets and linoleums to size, edges and binds carpeting and prepares carpets and linoleum for laying. The sewing machine shop unpacks sewing machines and their accessories and cabinets, whereupon it attaches the accessories to the machines and the latter are tested and then installed in cabinets or portable cases.

Defendant has two watchmen at Goldblatt's Lexington bakery and the parties agree that their activities constitute production of goods for commerce and hence they are covered by the act.

Defendant employs about ten persons in its central office. They perform administrative work in connection with defendant's furnishing watchman, guard, detective, fire inspection and shopping service to Goldblatt. They hire, assign and direct the work of all employees employed by defendant in Goldblatt's warehouses and stores. At the central office employees maintain all the books and records in connection with defendant's business. Defendant's payroll is kept there and from there weekly bills are sent to Goldblatt for the payroll plus social security and unemployment compensation contributions, the latter of which is sent by defendant to the State of Illinois or the State of Indiana and the United States Collector of Internal Revenue. At the central office, as a part of her duties, one employee communicates with the various employees of defendant stationed in the Goldblatt warehouses and stores and advises them when a truck will arrive at a warehouse after closing time. When a bad check is cashed in a Goldblatt store, that fact is telephoned to this woman, who, in turn, telephones the same information to defendant's detectives in all Goldblatt stores. There is a direct telephone line from the central office to all Goldblatt stores and warehouses.

Counsel for both parties have in their briefs treated the Fair Labor Standards Act of 1938, as subsequently amended, including the 1949 amendment to section 3 thereof (29 U. S. C. § 203) as governing this case.

Under the plain language of the act we are convinced that plaintiff was required to show that Goldblatt was engaged in the production of goods for interstate commerce and that defendant's employees now under consideration were engaged in occupations directly essential to such production or that they were employees engaged in interstate commerce. *Engebretsen* v. *Albrecht Co.*, 150 F. 2d 602, at 604.

Plaintiff contends that the Goldblatt warehouse employees are engaged in "handling" and "working on" goods intended for interstate shipment, which, under the definition of "produced" in section 3(j) and the decisions of this court and of the United States Supreme Court, constitutes "production of goods for commerce", and that the employees of defendant, which furnishes the guard,

watchman, detective, and fire inspection service for these warehouses, are engaged in a "closely related" process or occupation "directly essential" to such production within the meaning of section 3(j) and are, therefore, engaged in producing goods for commerce.

Section 3(j), as amended, reads as follows:

> "(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

As to the work done in the furniture renovation shop, television and radio clinic, carpet and linoleum and sewing machine shops, there is no production. Such work constitutes the rendering of services upon articles already produced. Insofar as these activities pertain to goods theretofore sold to Goldblatt's customers, they fall within the exemption of a retail servicing occupation in accordance with the Regulations issued by the Wage and Hour Division of the Department of Labor, which provide in Section 779.14(c) in part as follows:

> "Work performed on the customer's own goods where the completed job will not result in the creation of a different product from that which the customer brought in will be considered as 'services' for purposes of the exemption, and, if recognized in the particular industry as retail services, will be considered as such in determining the applicability of section 13(a) (2). For example, the recapping of a tire for a customer, the reupholstering of a chair for a customer, the repairing of an automobile for a customer regardless of the degree of repairs, the rebuilding of a pair of shoes for a customer, the rebuilding of a typewriter for a customer, will be regarded as the performance of services for purposes of the application of Section 13(a) (2) exemption to retail or service establishments and employees employed by them."

As to those activities relating to Goldblatt's own goods, the work done in the clinic and shops does not create a different product, and hence does not constitute production.

From a consideration of the processes occurring in the warehouses it is inescapable that there is physical touching by Goldblatt's employees of the goods in the warehouses which are intended for movement in interstate commerce. Plaintiff contends also that

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these goods are "worked on" by Goldblatt employees in the warehouses. The words "handled" or "worked on" include every kind of incidental operation preparatory to putting goods into the stream of commerce. But there is a distinction between handling in transportation, on the one hand, and producing, on the other hand, which is put to naught by a contention such as plaintiff's that by definition everyone who handles goods is thereby made a producer. As was said in *Western Union* v. *Lenroot*, 323 U. S. 490, at 504:

> "One would not readily impute such an absurdity to Congress; nor can we assume, contrary to the statute, that 'produced' means one thing in one section and something else in another. To construe those words to mean that handling in carriage or transmission in commerce makes one a producer makes one of these results inevitable. Congress, we think, did not intend to obliterate all distinction between production and transportation."

In the warehouses, Goldblatt's employees receive, store, in some cases split up large packages of goods into smaller ones, and re-ship. These are not acts of production. They do nothing to affect the character of the articles themselves. Such handling is not production. There is no "working on" the goods by these employees. It will be noted, therefore, as a matter of fact that in the case at bar the employees of Goldblatt do not produce any goods in these warehouses. There being no production in the warehouses by Goldblatt employees, it cannot be said that any duties of defendant's employees on said premises are performed in any process or occupation related or essential to the production of goods, within the meaning of section 3(j).

In *Engebretsen* v. *Albrecht Co.*, *supra*, relied upon by plaintiff, this court concluded that a janitor and watchman performed a service essential to an operation which the court found to be the production of goods for commerce, and, therefore, held that that employee was covered by the act. That case is not controlling here where we find there was no production of goods for commerce carried on in the Goldblatt warehouses.

Plaintiff also contends that the receiving, handling, and shipping of goods interstate at the Goldblatt warehouses constitutes engagement "in commerce" and that the guards, watchmen, detectives and fire inspectors, who are employed by the defendant to furnish a highly integrated fire and theft protection service at such warehouses, who control the departure of interstate shipments and who protect the actual transportation of the goods, are "engaged in commerce".

The real test as to defendant's employees is whether they (the employees themselves) are engaged in an interstate commerce

activity. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. We must look to the employee's activity rather than the employer's activity, so far as "engaged in commerce" determines liability. *Engebretsen* v. *Albrecht Co., supra*, at page 605. At the outset of this part of the discussion, it is to be noted that the seal-checking guards examine the seals on trucks before incoming trucks are unloaded and after outgoing trucks are loaded and sealed. Until incoming trucks are actually unloaded and the contents deposited on the warehouse platform they are in interstate commerce, and after outgoing trucks are loaded and sealed they are also in interstate commerce. The seal-checking guards in performing their function of checking these seals in the interest of security of the contents of the trucks are engaged in interstate commerce and are, therefore, subject to the act. *Walling* v. *Goldblatt Bros., Inc.*, 128 F. 2d 778, at 782.

Defendant admits in its brief that some of the Goldblatt warehouse employees are involved in interstate commerce (appellant's brief, 50). The facts in this case show, however, that none of the employees of defendant working at the warehouses, except the seal-checking guards, is himself engaged in commerce.

It will be noted that section 7(a) of the act (29 U. S. C. § 207(a)) provides:

> "(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce * * * for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

In *Carrigan* v. *Provident Trust Co. of Philadelphia*, 153 F. 2d 2d 74, the court, in considering whether a bank guard was subject to the act, said, beginning at page 74:

> "In § 3(j), 29 U.S.C.A. § 203 (j), 'production' is broadly defined * * *. 'Commerce' on the other hand, is narrowly limited in § 3(b), 29 U. S. C. A. § 203(b) * * *
>
> An important distinction between the two definitions is evident. Congress described 'production' to include acts merely necessary to the production of goods. 'Commerce', on the other hand, is so closely circumscribed that acts merely necessary to commerce are not included. The wide variation in the scope of the two terms has been frequently noted."

The court cited *McLeod* v. *Threlkeld*, 319 U. S. 491, saying that there, at 497, it was declared:

> "That 'The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's

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activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, 'production of goods for commerce.'

* * * * * * *

Only one question is involved here, namely, is appellant 'engaged in commerce' within the meaning of the Fair Labor Standards Act.

This court held in *Blumenthal* v. *Girard Trust Co.*, 3 Cir. 1944, 141 F. 2d 849, that a caretaker or janitor of a building, containing at least one tenant engaged in interstate commerce, was not an employee within the terms of the Act. * * *

As the courts have consistently maintained, it is the work of the employee and not the nature of his employer's business that determines the applicability of the Act. * * * That the employer's entire business is not interstate in character is unimportant so long as a substantial part of the employee's work relates to the interstate movement of goods. *Walling* v. *Jacksonville Paper Co.*, 1943, 317 U. S. 564, 572, 63 S. Ct. 332, 87 L. Ed. 460. That a building is wholly occupied by an employer, whose business is partly interstate in character, or only partially occupied by such an employer, is immaterial with respect to the status under the Act of a building guard. It would seem that the instant case cannot be distinguished in character of fact from its predecessors in this court unless appellant's duties of guarding appellee's bank building are 'so closely related to the move of the commerce as to be a part of it.' * * *

But for a rather remote possibility that the law would be violated by a person or persons violently and forcefully breaking into the bank premises with the intent of robbery, or that some emergency should arise as a fire or leaky pipe, the watchman's services could have no effect upon commerce, and even then the effect of the watchman's acts would be negative and not acts in commerce. He had no hand whatever in the affirmative acts which constitute commerce."

There is nothing stated in *Carrigan* v. *Provident Trust Co.*, *supra*, which is inconsistent with the holding in *Walling* v. *Goldblatt Bros., Inc.*, 128 F. 2d 778.

Accordingly, we hold that none of the defendant's employees in the warehouses, with the exception of the seal-checking guards, is covered by the act.

As to the employees in defendant's central office, it appears that there is one employee who gives a substantial part of her time to making and receiving telephone calls to and from defendant's guards at the Goldblatt warehouses and stores, some of the latter being in the State of Indiana. It will be noted that these telephone calls are from and to persons entirely in the service of defendant. When employees talk to each other in performing their duties for their employer, they are not engaged in commerce as that word is used in the act now under consideration. That is true whether they sit at adjoining desks or are at the opposite ends of a telephone wire and regardless of whether that wire crosses state lines. This is still true even though another, who owns the wire, may be engaged in commerce in the transmitting of the sound of human voices over that wire. Section 3 of the act (29 U. S. C. § 203) declares that "commerce means trade, commerce, transportation, transmission, or communication" interstate. As was said in *Fleming* v. *Jacksonville Paper Co.*, 128 F. 2d 395, at 398:

> "Transportation is only a part of it. Trade is another part, and according to the old maxim, it takes two to make a trade. Importer as well as exporter, buyer as well as seller, is a participant; and ordering and paying for goods are included."

If it takes two to make a trade, these two must be the employer and another person or firm with which he is dealing. Communication means from one person to another; that is from the employer to some other person or firm. It cannot reasonably be said to mean a communication by one of the employees of an employer to another employee of the same employer. In the case at bar, the person doing the telephoning to points in another state did not call anyone outside of the defendant's own staff of employees. There was no communication within the definition of commerce contained in the act. Neither by the statutory definition nor as commonly understood does "commerce" include communication by word of mouth between the servants of a common employer in the course of the latter's business. Telephoning by an employee to persons not in the employer's organization, on behalf of his employer, for the benefit of a third party with whom the employer has a contract for such service, would be an act in commerce. But that is not the factual situation which confronts us. It follows that the telephoning done by the employee in question does not bring her under the act.

This conclusion is strengthened by the fact that this particular employee is not engaged in selling and delivering across state lines or at buying and receiving across state lines, and hence would not fall within the category referred to in *Fleming* v. *Jacksonville Paper Co.*, *supra*, at page 398, where the court said:

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"Those who work either at selling or delivering across State lines, or at buying and receiving across State lines, are employed in commerce, whether they write the letters, keep the books, or load and unload or drive the trucks."

There are other employees in the central office of defendant. Their duties include the supervision of the various guards and watchmen stationed by defendant in the Goldblatt warehouses and stores, as well as the keeping of payroll records and the making of payments to said employees of salaries, less tax deductions. Inasmuch as the only employees in this group serviced by the central office who are engaged in interstate commerce are the seal-checking guards, of whom there are only three, and two watchmen at the Lexington bakery, which is engaged in production, and since the record is silent as to the amount of time actually expended by the employees in the central office in connection with these five employees, the plaintiff has not established that in connection therewith central office employees are devoting a substantial part of their time to these five employees (*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, at 572) and hence this court cannot say that the said central office employees are covered by the act. In all other respects it is clear on this record that none of the central office employees of defendant is subject to the act.

Conclusion

For the reasons above stated, we conclude that as to the seal-checking guards the decree of the court below is affirmed and in all other respects it is reversed.

Affirmed in Part; Reversed in Part.

A true Copy:
Teste:

____ ____,
Clerk of the United States Court of Appeals for the Seventh Circuit.

And on the same day, to-wit: On the twenty-ninth day of March, 1954, the following further proceedings were had and entered of record, to-wit:

Monday, March 29, 1954

Before Hon. J. Earl Major, *Chief Judge;* Hon. H. Nathan Swaim, *Circuit Judge;* Hon. Elmer J. Schnackenberg, *Circuit Judge*

No. 10936

James P. Mitchell, Secretary of Labor, plaintiff-appellee,

vs.

Joyce Agency, Inc., defendant-appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by Counsel.

On consideration whereof: It is ordered and adjudged by this Court that the Judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed as to the seal-checking guards, and that the said Judgment in all other respects be, and the same is hereby, Reversed.

And afterwards, to-wit: On the thirteenth day of April, 1954, there was filed in the office of the Clerk of this Court, a Petition for Rehearing, which said Petition is not copied here.

And afterwards, to-wit: On the twenty-second day of April, 1954, there was filed in the office of the Clerk of this Court, an Answer to Petition for Rehearing, which said Answer is not copied here.

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And afterwards, to-wit: On the twenty-third day of April, 1954, the following further proceedings were had and entered of record, to-wit:

Friday, April 23, 1954

Before Hon. J. EARL MAJOR, *Chief Judge;* Hon. H. NATHAN SWAIM, *Circuit Judge;* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 10936

JAMES P. MITCHELL, SECRETARY OF LABOR, PLAINTIFF-APPELLEE,

vs.

JOYCE AGENCY, INC., DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the Petition for a Rehearing of this cause be, and the same is hereby, DENIED.

And afterwards, to-wit: On the fourth day of May, 1954, the Mandate of this Court issued to the United States District Court for the Northern District of Illinois, Eastern Division.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, Chicago 10, Illinois

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of the Opinion of the Court, the Judgment, reference to filing Petition for Rehearing and Answer, Order denying Petition for Rehearing, and Reference to Issuance of Mandate, in

Cause No. 10936

JAMES P. MITCHELL, SECRETARY OF LABOR, PLAINTIFF-APPELLEE,

vs.

JOYCE AGENCY, INC., DEFENDANT-APPELLANT

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 21st., day of June A. D. 1954.

[SEAL.]

(S.) KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

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Supreme Court of the United States

No. 230, October Term, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

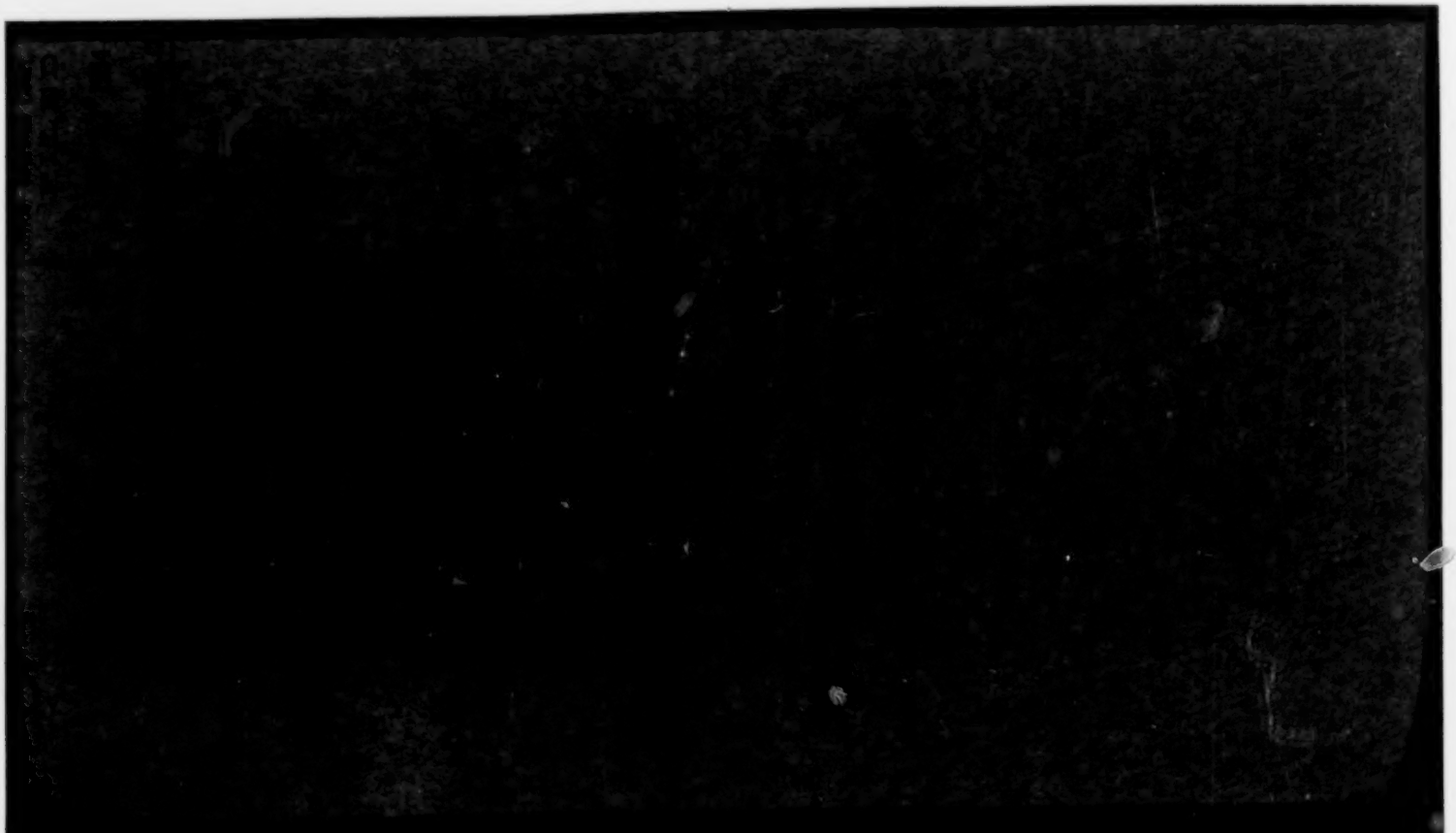
JOYCE AGENCY, INC.

Order allowing certiorari

Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. —.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOYCE AGENCY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above case on March 29, 1954, petition for rehearing denied on April 23, 1954.

OPINIONS BELOW

The memorandum opinion and the "Findings of Fact and Conclusions of Law" of the District Court appear in the record at pages 92 to 118. The opinion is reported at 110 F. Supp. 918. The opinion of the Court of Appeals (App. 1a–15a) is reported at 211 F. 2d 241.

JURISDICTION

The judgment of the Court of Appeals (App. 15a) was entered on March 29, 1954, and peti-

tioner's petition for rehearing was denied on April 23, 1954 (App. 16a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether guards and watchmen, and related clerical workers, employed to furnish theft and fire protection to the warehouses of an interstate chain-store organization, where large amounts of merchandise from out-of-State sources are regularly received, unloaded, packaged and otherwise handled, and shipped out of the State, are engaged "in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of October 26, 1949, c. 736, 63 Stat. 910; 29 U. S. C. 201 *et seq.*, are:

Definitions:

> Section 3 (63 Stat. 911): As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other

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manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * *

Maximum Hours:

Section 7 (63 Stat. 912):

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

STATEMENT

This action was brought by the Secretary of Labor pursuant to Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime provisions of the Act. The facts of the case were largely stipulated (Stipulation of Facts, R. 14–58), and the Findings of Fact by the district court (R. 101–117) are undisputed. Respondent, Joyce Agency, Inc., is an

Illinois corporation with its central office and place of business in Chicago, engaged in the business of furnishing watchman, guard, detective, and fire inspection services to the huge multi-million dollar interstate merchandise system of Goldblatt Brothers, Inc. (Fdg. 1; R. 101; opinion of dist. ct., R. 93).

Goldblatt Brothers, Inc. ("Goldblatt") owns and operates a chain of fourteen retail department stores, eleven of which are located in Illinois and three in Indiana, and four large warehouses in Illinois from which merchandise is distributed to the stores both in Illinois and Indiana (Fdgs. 2, 4, 5, 15, 27, 32; R. 101–102, 106, 110, 111). The total annual sales volume of Goldblatt's stores exceed $90,000,000 (Fdg. 2; R. 101). Most of this merchandise is distributed from the four warehouses directly to the stores by means of Goldblatt's own motor transportation system consisting of 127 trucks, 70 trailers and 17 tractors (Fdg. 3; R. 101, 93).

Each of the four warehouses regularly and daily receives in interstate commerce from points outside of the State of Illinois large quantities of merchandise, having an annual sales value of millions of dollars. A "very large percentage of these goods are distributed from the four warehouses directly to stores in Indiana" (R. 93). At the "Wentworth Warehouse," for example, more than 30 million dollars worth of merchandise is received and shipped per year, 70 percent

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of which is regularly received from out-of-State sources, and 20 percent of which is shipped to the Indiana stores (Fdg. 5; R. 102). At the "Ashland Warehouse and Garage," 12½ million dollars worth of merchandise is received and handled, 65 percent of which is regularly received from out-of-State sources, and 20 percent of which is shipped to the Indiana stores (Fdg. 15; R. 106). At the "63rd Street Warehouse", over 10 million dollars worth of merchandise is received and handled, 50 percent of which is received from out-of-State sources, and 17 percent of which is shipped to Indiana stores (Fdg. 27; R. 110). At the "Wabash Warehouse", more than 18 million dollars worth of merchandise is received and handled, 22 percent of which comes from out-of-State sources, and approximately 2 percent of which is shipped to Goldblatt customers outside of Illinois (Fdg. 32; R. 111).

Goldblatt employs approximately 400 employees at these four warehouses to receive, unload, check, handle, assemble, repack, and reship the merchandise (Fdgs. 7, 17, 29, 33; R. 102, 106, 110, 112). Typical of the operations involved at the Goldblatt warehouses are those performed at "Wentworth," which are summarized in the district court's Findings of Fact as follows: "The receiving department employees deposit these goods on the receiving platform and on freight elevators adjacent to and opening onto the railroad siding. Shipments from 50 to 60 trucks and

trailers are received daily and an average of four railroad freight cars is received each week. 'Break-bulk' shipments, which are received daily, are taken after unloading directly from the receiving platform to the shipping platform for immediate forwarding to a particular Goldblatt store designated on the common carrier freight bill for such shipment. All other goods, after being unloaded, are moved to the various stock departments and are unpacked, counted, checked, marked, and placed in stock. Orders for all Goldblatt stores are filled from said stock departments in the following manner: The merchandise is picked from stock, placed in bins, checked and packed in containers, or placed on racks; sorted and checked by store, taken to the 'store runs' on the shipping platform, from which they are loaded onto Goldblatt's trucks and trailers, and transported to Goldblatt's stores, including the three Indiana stores. Orders not completely picked or packed by quitting time are left in that incompleted state in their respective stock departments until the next working day. Assembled goods are left in the 'store runs' until the next working day. Trucks or trailers which are loaded and sealed, partially loaded, or empty also remain in the warehouse until the next working day. An average of 75 Goldblatt trailers is loaded weekly at the shipping platform and of this number approximately 15 trailers a week go to Goldblatt's Indiana department stores. Goods

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are daily transported to Goldblatt's stores, including the stores in Hammond, Gary, and South Bend, Indiana" (Fdg. 8; R. 102–103).

Respondent Joyce Agency furnishes the watchmen and guards to protect the merchandise and the warehouses during all of these operations. While the individual duties of the guards, watchmen and detectives vary somewhat at the different warehouses, the protection service rendered "is basically the same in all four warehouses" (dist. ct. opinion, R. 94). "The primary difference is found in the number of employees used by defendant at the various warehouses to administer this protective service," which "seems to be determined by the volume of business activity at each establishment" (*ibid.*). As the district court found, respondent Joyce Agency "offers Goldblatt Brothers a highly systematic protection service, which exceeds the normal watchman activity" and includes maintaining "a close watch over all stages of the respective operations on both the receiving and shipping platforms," as well as "patrol [of] the entire premises, guard[ing] the goods in all stages of being received, handled, stored, prepared for shipments and shipped including those enroute to the shipping platform and on the receiving and shipping platforms, as well as in the railroad cars and motor trucks and trailers in the truck pit, together with the cars, trucks and trailers themselves from fire, theft and other damage" (R. 94).

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The close integration of the duties of respondent's employees in the warehouse operations of Goldblatt is well illustrated by the district court's finding as to the procedure for handling valuable goods at the Wentworth warehouse (Fdg. 11; R. 103–104). The shipping platform guard takes "personal custody" of these "'valuable goods' (goods particularly susceptible to theft, such as cigarettes, furs, jewelry, guns, and nylon hosiery) * * * at a designated place on the shipping platform, guarding them at all times while they are on the platform and throughout the loading process until the trailer is locked and sealed, and then preparing a shipment memorandum listing the nature of the goods being shipped, department number, number of pieces, bill number, trailer number, and seal number. He gives this memorandum to the [respondent's] Wentworth Warehouse front door guard, who transmits this information to [respondent's] guard or special service man stationed at the Goldblatt store to which the goods are being shipped" (Fdg. 11; R. 103–104).

Respondent coordinates the service it renders to Goldblatt through a central office in Chicago which performs "the administrative work integrating [respondent's] furnishing of night watchman, guard, detective, fire inspection, and shopping service to Goldblatt" (Fdg. 36; R. 113). Inasmuch as respondent testified that it had only one other client to whom it furnished two or three

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persons out of a payroll of 85 people (R. 70–71), practically the entire work of the bookkeepers, statement clerk, and switchboard operator concerned herein was in connection with the service rendered to Goldblatt.

The duties of the switchboard operator have been performed by the bookkeeper four days and by the statement clerk one day each week (Fdgs. 37, 38, 39; R. 113–115). As switchboard operator, the bookkeeper and statement clerk "handle all incoming and outgoing calls through the switchboard in [respondent's] central office, including all calls between [respondent's] central office and [respondent's] employees stationed in all Goldblatt warehouses and stores" (Fdg. 39; R. 114). Calls to and from Goldblatt's Indiana stores are placed daily through the switchboard at Goldblatt's State Street store in Chicago which has a direct line to each of them (Fdg. 39; R. 114, 64–65). "Employees in respondent's central office also make calls to and receive calls from points in States other than Illinois and Indiana, depending on the circumstances of the business" (Fdg. 39; R. 115).

The district court held that the Act covered all of respondent's guards and watchmen employed at Goldblatt's warehouses, and the clerical workers performing the administrative work in connection with furnishing such guards, including the switchboard operator (R. 117). The activities of respondent's guards and watchmen in the various warehouses, concluded the district court, "con-

tribute so materially and directly to interstate commerce as to be a part thereof * * *. They are the integral components of a highly [illegible]-matic security system which is as important and vital part of this commerce as traffic control and other warehousing and shipping techniques. This is borne out by the fact that the protection service is given not only at the warehouse premises but also during the course of transportation itself, by means of telephonic communications regarding shipments to designated stores. The fact that the night watchmen assume none of these operational duties, but are limited, more or less, to the patrolling and guarding of the premises during the night hours does not withdraw them from interstate commerce. They guard against fire, theft, and other hazards, during a time of greater need, not only the wares, which are in the process of being received as well as shipped in interstate commerce, but also the vehicles, which are the instrumentalities of that commerce" (R. 95–96). The trial court concluded that the guards at the warehouse were also engaged "in the production of goods for commerce because they are engaged in a 'closely related process or occupation directly essential to the production' of goods for commerce which is being carried on at the various warehouses" (R. 96). Respondent's employees at its central office were also held by the trial court to be engaged in both interstate commerce and production of goods for commerce,

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both by reason of their direct "interstate telephone activity" and "interstate use of the mails" as well as by reason of the fact that their activities "effectuate the coordination, integration and orderly administration of the defendant's protection service at the warehouses, where there is production of goods for commerce" (R. 97–98).

The court of appeals reversed on the ground that neither guards and watchmen employed at Goldblatt's warehouses where goods are regularly received, handled and shipped in interstate commerce, nor the office and clerical employees performing the necessary administrative work in connection with furnishing such guard service, are engaged "in commerce" within the meaning of the Act (App. 12a, 14a–15a); that coverage cannot be sustained for these employees on "production" grounds since Goldblatt's handling of goods in this case does not constitute "production" (App. 8a); and that the making of interstate telephone calls between employees of the same employer is not "communication" in interstate commerce (App. 12a). Out of a total of approximately 85 employees, the only employees held covered by the Court of Appeals were two guards at Goldblatt's bakery (who were conceded to be engaged in production of goods for commerce), and three "seal-checking guards," who check the lock and seals on trucks before permitting them to unload or to leave the warehouses when loaded. The office and clerical employees were disposed of on the ground that

the record did not establish that they "are devoting a substantial part of their time to these five employees" (App. 14a). The other guards, the court stated, "do not physically handle the goods received or shipped" (App. 3a).

REASONS FOR GRANTING THE WRIT

The decision below, both in its result and its reasoning, conflicts directly with decisions of several other Courts of Appeals, as well as with previous decisions of its own. It is also patently inconsistent with the numerous decisions of this Court construing the scope of the coverage of this Act. If unreviewed, the decision below can serve only to confuse and unsettle important areas of the Act's coverage.

1. The ruling that the guards and watchmen are not engaged "in commerce" is in direct conflict with the Fifth Circuit's decisions in *Walling* v. *Sondock*, 132 F. 2d 77 (C. A. 5), certiorari denied, 318 U. S. 772; and *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5); and is also in conflict with the Fourth Circuit's decisions in *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4); *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (C. A. 4).

The *Sondock* and *Russell* cases are indistinguishable from the instant case; indeed, the factual situation in the instant case affords an even stronger basis for coverage. In *Sondock*, as here, a watchman agency was involved. It rendered services generally to interstate whole-

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salers and distributors as well as to producers of goods for commerce. The Fifth Circuit held that the watchmen who guarded and protected the interstate distribution transactions were engaged "in commerce." The same result was reached in the *Russell* case with respect to a watchman who guarded the entire premises of a wholesale grocer, including the yard where motor trucks were parked and the spur tracks on which there were freight cars to be unloaded. There the Fifth Circuit pointed out that it had held in the *Sondock* case that *"night watchmen who guarded and protected interstate distribution transactions were 'engaged in commerce'"* (187 F. 2d at 526; emphasis added).

The *Sondock* decision states the test for determining coverage in this type of case as follows: "* * * if an employee's services are part of and contribute materially to the consummation of transactions in interstate commerce, the employee is engaged in commerce as defined by the Act" (132 F. 2d at 78). The services performed by the employees in this case meet that test *a fortiori,* since they are performed exclusively for and are directly integrated into Goldblatt's extensive interstate transactions. In findings of fact, unchallenged by the employer, the trial court found that the employees render "a highly systematic protection service, which exceeds the normal watchman activity," to Goldblatt's huge interstate

merchandise business, that the "guards maintain a close watch over all stages of the respective operations on both the receiving and shipping platforms," that the "night watchmen patrol the entire premises" and "guard the goods in all stages of being received, handled, stored, prepared for shipments" (R. 94). In short, their services are "integral components of a highly systematic security system which is as important and vital part of this commerce as traffic control and other warehousing and shipping techniques" (R. 95).

To the extent that the decision makes "physical" contact with goods or vehicles moving in interstate commerce the test for determining "in commerce" coverage of watchmen, it is also in conflict with the Fourth Circuit's decisions in *Slover* v. *Wathen* and *Bennett* v. *V. P. Loftis, supra.* In the *Slover* case, the Fourth Circuit held that the work of a watchman in guarding interstate barges while under repair was "so closely related to the movement of commerce as to be a part of it within the test prescribed by the Supreme Court in *McLeod* v. *Threlkeld,* 319 U. S. 491." And in the *Bennett* case, it applied the "in commerce" coverage to a watchman guarding the construction of a new highway bridge.

The decision in the instant case is also in conflict with the Seventh Circuit's own prior decision in *Engebretsen* v. *E. J. Albrecht Co.,* 150 F. 2d 602 (C. A. 7). That decision held that a watchman at the equipment and storage yard of an inter-

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state construction company was engaged "in commerce." Immediately after citing and discussing *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4) and other "in commerce" cases, the opinion stated (150 F. 2d, at 606):

> *Under repeated decisions* plaintiff's employment as watchman and caretaker was of such character and so intimately connected with the tools and equipment which passed into interstate commerce that it can be properly held that his services were so *essential to such commerce as to become a part thereof* * * *. [Emphasis added.]

The importance of this holding on "in commerce" coverage was emphasized on remand when the defendant sought to prove that "production" coverage was not applicable. The district court considered this offer of proof immaterial because "the defendant's liability can be predicated on *the sole ground of its having been engaged in interstate commerce.* The Circuit Court of Appeals, on facts admitted by the defendant * * * held that the District Court was in error in holding that the defendant was not engaged in interstate commerce." *Engebretsen* v. *E. J. Albrecht Co.*, 5 W. H. Cases 900, 10 Labor Cases ¶ 63,001 (N. D. Ill.—1946). [Emphasis added.]

Insofar as an engagement "in commerce" is concerned, the Seventh Circuit's opinion in the instant case does not consider or attempt to dis-

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tinguish either its own decision in *Engebretsen* v. *E. J. Albrecht Co.*, 150 F. 2d 602 (C. A. 7), or the decisions of the other court of appeals cited above which involved factual situations closely paralleling the facts of the instant case, but relies instead on *Carrigan* v. *Provident Trust Co.*, 153 F. 2d 74 (C. A. 3), which involved an entirely different factual situation; i. e., a night watchman at the branch office of a bank. In the *Carrigan* case, there were no findings by the trial court that the duties of these maintenance employees had any connection with the interstate aspects of the banking business, and the court of appeals, in affirming the trial court's ruling of no coverage, emphasized that "No act within the scope" of the night watchman's "duty touches any facet of the acts of commerce in which the bank was engaged" (153 F. 2d at 76). In contrast, here the district court found that the respondent's employees are "integral components of a highly systematic security system which is as important and vital part of this commerce as traffic control and other warehousing and shipping techniques" (R. 95), and specified in detail how the guards "maintain a close watch over all stages of the respective operations on both the receiving and shipping platforms."

2. The ruling that the respondent's employees are not within the "production of goods for commerce" phase of the Act's coverage is based on the conclusion that Goldblatt's warehouse employ-

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ees are not so engaged (App. 8a). Here again its holding is in conflict with the decisions of the Eighth Circuit Court of Appeals in *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C. A. 8); *Walling* v. *Friend*, 156 F. 2d 429 (C. A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C. A. 8); and cannot be reconciled with prior decisions by the Seventh Circuit holding acts of handling in the distribution of goods to constitute "production" (*McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329, certiorari denied, 332 U. S. 855; *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369, vacated as moot, 326 U. S. 690).

The *Wyandotte*, *Mutual Wholesale*, *Blue Star* and *Montgomery Ward* cases, like the instant case, all involved chain store organizations engaged in distributing goods manufactured by others. In all of these cases, the goods were handled, as here, in the course of receiving and shipping them into and out of the warehouses which served the selling outlets. Thus, the warehouse employees in *Wyandotte* were engaged in moving the goods into the warehouse, uncrating them, setting them up, repairing them, putting them in their proper space, taking them out to the platform and other similar handling. All of this work was held to have an "economic significance in relation to [the goods] being made a part of the stock of the Kansas store and plainly constituted the production of goods for commerce

within the definition of section 3 (j) of the Act" (169 F. 2d at 769). Similarly, in *Mutual Wholesale* where merchandise was repackaged, it was held that such work was "within that portion of the definition of 'produced' * * * which is expressed as 'handled, or in any other manner worked on in any State'" (141 F. 2d at 340).

The *Friend* case, though dealing with livestock and not involving a chain store organization, is also directly in point since the employer was not engaged in raising livestock but in selling it, which required such handling activities as sorting and grading. There the Eighth Circuit said: "Thus it appears that Congress intended the term 'production of goods for commerce' to be comprehensive and to include every incidental operation preparatory to putting goods into the stream of commerce," citing *Western Union* v. *Lenroot*, 323 U. S. 490.

As noted above, the decision in the instant case on the "production" question not only plainly conflicts with decisions of the Eighth Circuit but it is also in conflict with the Seventh Circuit's own prior decisions in the *Blue Star* and *Montgomery Ward* cases, *supra*. In *Blue Star*, the warehouses served a chain of retail stores located in Illinois and Indiana and performed functions similar in all relevant respects to the functions performed by the Goldblatt warehouses in this case. In sustaining coverage on "production" grounds, the Seventh Circuit relied on a decision by it involv-

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ing these same Goldblatt warehouses, and said (164 F. 2d at 330–331):

> * * * employees engaged in unloading and checking goods shipped in interstate commerce, and in handling them on the platforms, as well as those engaged in shipping such goods from warehouses in Illinois to stores in another state, *are all engaged in the production of goods for commerce or in an occupation necessary to such production*, *Walling* v. *Goldblatt Bros.*, 7 Cir., 152 F. 2d 475, 476 [emphasis added].

Though in the instant case "Goldblatt's [warehouse] employees receive, store, in some cases split up large packages of goods into smaller ones, and re-ship" (App. 8a), the Seventh Circuit now holds that "These are not acts of production" (*id.*). And it does so without even mentioning the *Blue Star* decision.

The *Montgomery Ward* decision, in which the Seventh Circuit also broadly construed the term "production," is not mentioned in its instant decision either. The question there was whether the President's seizure powers in the War Labor Disputes Act extended to a retail department store and mail order business, and it turned upon the meaning of the word "production" as used in that Act. Even though the War Labor Disputes Act did not contain the broad definition of the Fair Labor Standards Act, the Seventh Circuit, nevertheless, adopted the Fair Labor Standards Act's definition as construed in the *Western*

Union case, *supra*. The court said that the result would be the same without the definition in Section 3 (j) for "what definition of the word 'production' could otherwise be given when it is used in addition to the word 'manufacture'?" (150 F. 2d at 379).

Thus, the decision in the instant case, aside from its conflict with other circuits, cannot fail to cause confusion in the district courts within the Seventh Circuit.

3. The decision below, both in its result and in its reasoning, is also patently inconsistent with this Court's decisions. In a uniform line of decisions, this Court has held this Act applicable to custodial and maintenance employees guarding and servicing buildings and facilities used in the production of goods for commerce. *Arsenal Building Corp.* v. *Walling* and *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Borella* v. *Borden Co.*, 325 U. S. 679; *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Armour & Co.* v. *Wantock*, 323 U. S. 126; *Schulte Co.* v. *Gangi*, 328 U. S. 108. Except for the fact that, in most of these cases, the buildings were used for the physical manufacturing of goods, as distinguished from "production of goods" in its broader sense, the employees held within the coverage of the Act are indistinguishable from the employees involved in the instant case. Certainly they were no more closely integrated with the interstate commerce involved, and in some cases were far less closely integrated.

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The process of reasoning by which the Seventh Circuit reached an opposite conclusion in the instant case, both in its construction of the meaning of "production" and in its ruling that physical contact with the goods moving in commerce is required for coverage, plainly conflicts with this Court's decisions.

The Seventh Circuit's confusion in this case is perhaps best shown by its reliance on *Western Union* v. *Lenroot*, 323 U. S. 490, as supporting its conclusion that "handling" and "working on" include only steps in manufacture itself. The *Western Union* decision clearly holds that all "handling," "whether manufacture or not," falls within the Act's definition of "produced," except "the handling or working on which accomplishes the interstate transit or movement in commerce itself" (323 U. S. at 503) by "telegraph companies, railroads, interstate news agencies, and the like" (*id.* at 506). The reason for the exception is that Section 15 (a) (1) of the Act expressly provides that its "hot goods" provisions shall not apply to "any common carrier for the transportation in commerce" of "any goods not produced by such common carrier" (323 U. S. at 504). Thus, far from supporting the narrow view of "production" adopted by the decision below, the *Western Union* decision specifically refutes it.

Also plainly inconsistent with the views of this Court as expressed in *Borden Co.* v. *Borella*, 325

U. S. 679, is the reasoning by the court below that acts which "do nothing to affect the character of the articles themselves" are "not acts of production" (App. 8a). In the *Borden* case, which deals with the coverage of maintenance and custodial employees of an office building where "the articles themselves" were in no way physically handled, this Court pointed out that Section 3 (j) defines the term production "not only in the physical sense of manufacturing, mining and handling but also in the more general sense of producing or 'in any other manner' working on goods" (325 U. S. at 684). It is thus clear that production "is not simply the manual, physical labor involved in changing the form or utility of a tangible article" (*id.* at 683).

4. The decision below further conflicts with this Court's decisions and the decisions of other courts of appeals (and, indeed, again with its own previous decisions) in its holding that "communication" must be between employees of different employers in order for it to constitute "commerce." This ruling rests on the assumption that the Act applies only to commercial transactions or "trade." The court reasoned that "it takes two to make a trade," and "these two must be the employer and another person or firm with which he is dealing" (App. 13a).[1] This

[1] It may be noted that the court below was also in error in assuming that the interstate communication was limited to communications between respondent's own employees. While

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assumption is contrary to *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497; *Bodden* v. *McCormick Shipping Corp.*, 168 F. 2d 715 (C. A. 5), [illegible] v. *Summit King Mines*, 143 F. 2d 926 (C. A. 9); *Darr* v. *Mutual Life Insurance Co.*, 169 F. 2d 262 (C. A. 2), certiorari denied, 335 U. S. 871; and *Bell* v. *Porter*, 159 F. 2d 117, 119 (C. A. 7), certiorari denied, 330 U. S. 813. It also ignores the Act's definition of "commerce" which includes "transportation, transmission, or communication" as well as "trade."

In the *Powell* case, this Court specifically repudiated virtually the same construction with respect to "transportation" as the Seventh Circuit has now adopted with respect to "communication." It was urged in the *Powell* case that since the munitions were produced solely for the Government's use in the national defense and came into the Government's possession before their subsequent interstate shipment, the interstate transportation was not commerce because it was not for any trade or commercial purpose. The Court, however, found "no merit in an interpretation of the Act which would exclude from its coverage those employees who were en-

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this type of communication is described specifically and in detail in the district court's findings, there is also a more general, and unchallenged, finding that respondent's "employees in [respondent's] central office also make calls to and receive calls from points in States other than Illinois and Indiana, depending on the circumstances of the business" (Fdg. 39; R. 115).

gaged in the production of munitions for interstate transportation for use or consumption, as distinguished from transportation of them for sale or exchange" (339 U. S. at 512).

The Seventh Circuit itself, even prior to the *Powell* decision, made the same ruling in a similar case, stating flatly that "interstate commerce is not limited to interstate trade." *Bell* v. *Porter, supra,* 159 F. 2d at 119; see also the Seventh Circuit's recent reaffirmation of this ruling in *Mitchell* v. *Pilgrim Holiness Church Corporation,* 210 F. 2d 879, certiorari denied, 347 U. S. 1013.

Other courts of appeals have also rejected the concept that "commerce" must be "trade" to be covered by the Act. In reversing a lower court which denied coverage because the rebuilding and selling of a single surplus yacht was not part of a trade or business, the Fifth Circuit, in *Bodden* v. *McCormick Shipping Corp.,* 188 F. 2d 773 citing the *Powell* case, held, "whether or not, therefore, the transportation of goods is 'commerce' within the definition of the Act, does not depend upon whether such transportation is in connection with a trade or business." Prior to the decision in the *Powell* case, the Ninth Circuit also had so ruled in *Fox* v. *Summit King Mines,* 143 F. 2d 926, when it held that gold bullion produced in one State and mailed to a United States mint in another State consti-

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tuted "production of goods for commerce" under this Act, citing *inter alia International Textbook Co.* v. *Pigg*, 217 U. S. 91; and *Caminetti* v. *United States*, 242 U. S. 470, and concluding that "it is well settled that transmission through the mails is interstate commerce * * * and that it is immaterial whether or not the transportation is commercial in character" (143 F. 2d at 926). In *Darr* v. *Mutual Life Insurance Co., supra*, the Second Circuit held that insurance policies were goods produced for commerce even though the transportation occurred between the home office and the branch office.[2]

The narrow ruling on interstate communication in the instant case is also inconsistent with this Court's decisions in *North American Co.* v. *S. E. C.*, 327 U. S. 686 (where it was held that a holding company's use of the "mails and facilities of interstate commerce" in order to "maintain its other relationships and contacts with its own subsidiaries" constituted commerce (327 U. S. at 694–695)); and *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128, where the Court ruled that "interstate communication of a business nature, whatever the

[2] The only other decision precisely on this point is a district court decision which also reached the opposite result from that of the Seventh Circuit in the instant case. In *Walling* v. *Paramount-Richards Theatres*, 61 F. Supp. 290 (E. D. La.) the court held that telephone operators who received and transmitted long distance calls with out-of-state theaters owned by their employer were engaged in commerce.

means of such communication, is interstate commerce * * *."

CONCLUSION

It is apparent that the decision below is not only in direct conflict with decisions of other courts of appeals as well as at variance with the decisions of this Court, but that its reasoning reflects serious confusion and misapprehension of settled principles for determining the scope of this Act's coverage. The decision in the instant case therefore requires review by this Court, not only to correct the error in the result of this particular case, but also to avoid serious unsettling of the law with respect to important areas of the Act's coverage.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor,
United States Department of Labor.

JULY 1954.

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APPENDIX

1. *Opinion*

In the United States Court of Appeals for the Seventh Circuit

No. 10936. October Term, 1953, January Session, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR,
PLAINTIFF-APPELLEE

v.

JOYCE AGENCY, INC., A CORPORATION,
DEFENDANT-APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

March 29, 1954

Before MAJOR, *Chief Judge,* and SWAIM and SCHNACKENBERG, *Circuit Judges*

SCHNACKENBERG, *Circuit Judge:* This is an appeal by the defendant, Joyce Agency, Inc., from a judgment entered on May 7, 1953, by the United States District Court for the Northern District of Illinois, Eastern Division, finding that the defendant has violated sections 7 and 15 (a) (2) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. §§ 201, et. seq., as amended, 63 Stat. 910), and ordering, pursuant to section 17, that the defendant be enjoined from further

violating the provisions of section 15 (a) (2) of the Act.

The question for decision is whether defendant's employees were engaged in interstate commerce or in the production of goods for interstate commerce at four warehouses of Goldblatt Bros. and at defendant's central office, so as to bring them within the coverage of the act.

From the parties' stipulation of facts the following situation appears to have existed at all times hereinafter mentioned.

Defendant is an Illinois corporation with its central office at 343 South Dearborn Street, Chicago. It engages in the business of furnishing watchman, guard, detective, fire inspection and shopping service to Goldblatt Bros., Inc., hereinafter called "Goldblatt", and employs 72 persons.

Goldblatt owns and operates a chain of 14 retail department stores. Of these stores, 10 are in the city of Chicago and one in each of the cities of Joliet, Illinois, Hammond, Gary, and South Bend, Indiana. It has a central office in Chicago, Illinois, where the administrative work in connection with Goldblatt's organization is performed, including the purchase of various kinds of merchandise usually found in a large department store. To service its 14 department stores, Goldblatt maintains in Chicago, Illinois, warehouses at 3913 South Wentworth Avenue, 3161 South Ashland Avenue, 201 East 63rd Street, and 328 South Wabash Avenue. At these warehouses goods are received and stored and thereafter shipped to the defendant's various retail stores. Most of the goods received are from points outside Illinois

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and a substantial part of the goods shipped to retail stores is to those located in Indiana. At one of the warehouses, which is known as the Ashland warehouse, there are also a furniture renovating shop, a radio and television clinic, a carpet and linoleum department, and a sewing machine department, as well as a garage where nine persons are employed by Goldblatt in maintaining its motor transportation fleet.

Defendant's employees include guards and watchmen who guard the warehouses and their contents against all risks, including fire, and the loading and unloading of goods on the loading platforms of the warehouses, check all packages being carried out, keep records of the names of people working after closing hours for the use of the watchmen, open railroad doors to receive freight cars during the night, control ingress and egress of trucks in and out of the garage, and about 5 a. m. check out a truck carrying advertising material to the Indiana stores. Certain guards check the locks and seals on trucks before permitting them to unload or to leave the warehouses when loaded. Guards performing this particular service will be hereinafter referred to as the "seal-checking guards." Defendant's employees do not physically handle the goods received or shipped, except insofar as they may handle stolen goods recovered by them, valued at approximately $300 per year.

The furniture renovating shop reconditions, upholsters, repairs, replaces broken parts, assembles, refinishes and polishes furniture which has been damaged while on display in the stores or in transit. The clinic removes television and

radio sets from their cases, repairs new, display and customers' sets. The carpet and linoleum department cuts carpets and linoleums to size, edges and binds carpeting and prepares carpets and linoleum for laying. The sewing machine shop unpacks sewing machines and their accessories and cabinets, whereupon it attaches the accessories to the machines and the latter are tested and then installed in cabinets or portable cases.

Defendant has two watchmen at Goldblatt's Lexington bakery and the parties agree that their activities constitute production of goods for commerce and hence they are covered by the act.

Defendant employs about ten persons in its central office. They perform administrative work in connection with defendant's furnishing watchman, guard, detective, fire inspection and shopping service to Goldblatt. They hire, assign and direct the work of all employees employed by defendant in Goldblatt's warehouses and stores. At the central office employees maintain all the books and records in connection with defendant's business. Defendant's payroll is kept there and from there weekly bills are sent to Goldblatt for the payroll plus social security and unemployment compensation contributions, the latter of which is sent by defendant to the State of Illinois or the State of Indiana and the United States Collector of Internal Revenue. At the central office, as a part of her duties, one employee communicates with the various employees of defendant stationed in the Goldblatt warehouses and stores and advises them when a truck will arrive at a warehouse after closing time. When a bad check

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is cashed in a Goldblatt store, that fact is telephoned to this woman, who, in turn, telephones the same information to defendant's detectives in all Goldb'att stores. There is a direct telephone line from the central office to all Goldblatt stores and warehouses.

Counsel for both parties have in their briefs treated the Fair Labor Standards Act of 1938, as subsequently amended, including the 1949 amendment to section 3 thereof (29 U. S. C. § 203) as governing this case.

Under the plain language of the act we are convinced that plaintiff was required to show that Goldblatt was engaged in the production of goods for interstate commerce and that defendant's employees now under consideration were engaged in occupations directly essential to such production or that they were employees engaged in interstate commerce. *Engebretsen* v. *Albrecht Co.*, 150 F. 2d 602, at 604.

Plaintiff contends that the Goldblatt warehouse employees are engaged in "handling" and "working on" goods intended for interstate shipment, which, under the definition of "produced" in section 3 (j) and the decisions of this court and of the United States Supreme Court, constitutes "production of goods for commerce", and that the employees of defendant, which furnishes the guard, watchman, detective, and fire inspection service for these warehouses, are engaged in a "closely related" process or occupation "directly essential" to such production within the meaning of section 3 (j) and are, therefore, engaged in producing goods for commerce.

Section 3 (j), as amended, reads as follows:

> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

As to the work done in the furniture renovation shop, television and radio clinic, carpet and linoleum and sewing machine shops, there is no production. Such work constitutes the rendering of services upon articles already produced. Insofar as these activities pertain to goods theretofore sold to Goldblatt's customers, they fall within the exemption of a retail servicing occupation in accordance with the Regulations issued by the Wage and Hour Division of the Department of Labor, which provide in Section 779.14 (c) in part as follows:

> Work performed on the customer's own goods where the completed job will not result in the creation of a different product from that which the customer brought in will be considered as "services" for purposes of the exemption, and, if recognized in the particular industry as retail services, will be considered as such in determining the applicability of section 13 (a) (2). For example, the recapping of a tire for a customer, the reupholstering of a chair for a customer, the repairing of an automobile for a customer regardless of the degree of repairs, the rebuilding of a pair of shoes

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> for a customer, the rebuilding of a typewriter for a customer, will be regarded as the performance of services for purposes of the application of Section 13 (a) (2) exemption to retail or service establishments and employees employed by them.

As to those activities relating to Goldblatt's own goods, the work done in the clinic and shops does not create a different product, and hence does not constitute production.

From a consideration of the processes occurring in the warehouses it is inescapable that there is physical touching by Goldblatt's employees of the goods in the warehouses which are intended for movement in interstate commerce. Plaintiff contends also that these goods are "worked on" by Goldblatt employees in the warehouses. The words "handled" or "worked on" include every kind of incidental operation preparatory to putting goods into the stream of commerce. But there is a distinction between handling in transportation, on the one hand, and producing, on the other hand, which is put to naught by a contention such as plaintiff's that by definition everyone who handles goods is thereby made a producer. As was said in *Western Union* v. *Lenroot*, 323 U. S. 490, at 504:

> One would not readily impute such an absurdity to Congress; nor can we assume, contrary to the statute, that "produced" means one thing in one section and something else in another. To construe those words to mean that handling in carriage or transmission in commerce makes one a producer makes one of these results inevitable. Congress, we think, did not intend

to obliterate all distinction between production and transportation.

In the warehouses, Goldblatt's employees receive, store, in some cases split up large packages of goods into smaller ones, and re-ship. These are not acts of production. They do nothing to affect the character of the articles themselves. Such handling is not production. There is no "working on" the goods by these employees. It will be noted, therefore, as a matter of fact that in the case at bar the employees of Goldblatt do not produce any goods in these warehouses. There being no production in the warehouses by Goldblatt employees, it cannot be said that any duties of defendant's employees on said premises are performed in any process or occupation related or essential to the production of goods, within the meaning of section 3 (j).

In *Engebretsen* v. *Albrecht Co., supra,* relied upon by plaintiff, this court concluded that a janitor and watchman performed a service essential to an operation which the court found to be the production of goods for commerce, and, therefore, held that that employee was covered by the act. That case is not controlling here where we find there was no production of goods for commerce carried on in the Goldblatt warehouses.

Plaintiff also contends that the receiving, handling, and shipping of goods interstate at the Goldblatt warehouses constitutes engagement "in commerce" and that the guards, watchmen, detectives and fire inspectors, who are employed by the defendant to furnish a highly integrated fire and theft protection service at such warehouses, who control the departure of interstate shipments

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and who protect the actual transportation of the goods, are "engaged in commerce."

The real test as to defendant's employees is whether they (the employees themselves) are engaged in an interstate commerce activity. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517. We must look to the employee's activity rather than the employer's activity, so far as "engaged in commerce" determines liability. *Engebretsen* v. *Albrecht Co., supra,* at page 605. At the outset of this part of the discussion, it is to be noted that the seal-checking guards examine the seals on trucks before incoming trucks are unloaded and after outgoing trucks are loaded and sealed. Until incoming trucks are actually unloaded and the contents deposited on the warehouse platform they are in interstate commerce, and after outgoing trucks are loaded and sealed they are also in interstate commerce. The seal-checking guards in performing their function of checking these seals in the interest of security of the contents of the trucks are engaged in interstate commerce and are, therefore, subject to the act. *Walling* v. *Goldblatt Bros., Inc.,* 128 F. 2d 778, at 782.

Defendant admits in its brief that some of the Goldblatt warehouse employees are involved in interstate commerce (appellant's brief, 50). The facts in this case show, however, that none of the employees of defendant working at the warehouses, except the seal-checking guards, is himself engaged in commerce.

It will be noted that section 7 (a) of the act (29 U. S. C. § 207 (a)) provides:

> (a) Except as otherwise provided in this section, no employer shall employ any of

> his employees who is engaged in commerce * * * for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

In *Carrigan* v. *Provident Trust Co. of Philadelphia,* 153 F. 2d 74, the court in considering whether a bank guard was subject to the act, said, beginning at page 74:

> In § 3 (j) 29 U. S. C. A. § 203 (j), "production" is broadly defined * * *. "Commerce" on the other hand, is narrowly limited in § 3 (b), 29 U. S. C. A. § 203 (b) * * *
>
> An important distinction between the two definitions is evident. Congress described "production" to include acts merely necessary to the production of goods. "Commerce", on the other hand, is so closely circumscribed that acts merely necessary to commerce are not included. The wide variation in the scope of the two terms has been frequently noted.

The court cited *McLeod* v. *Threlkeld,* 319 U. S. 491, saying that there, at 497, it was declared:

> [that] The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the

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other phrase, "production of goods for commerce."

* * * * *

Only one question is involved here, namely, is appellant "engaged in commerce" within the meaning of the Fair Labor Standards Act.

This court held in *Blumenthal* v. *Girard Trust Co.*, 3 Cir. 1944, 141 F. 2d 849, that a caretaker or janitor of a building, containing at least one tenant engaged in interstate commerce, was not an employee within the terms of the Act. * * *

As the courts have consistently maintained, it is the work of the employee and not the nature of his employer's business that determines the applicability of the Act. * * * That the employer's entire business is not interstate in character is unimportant so long as a substantial part of the employee's work relates to the interstate movement of goods. *Walling* v. *Jacksonville Paper Co.*, 1943, 317 U. S. 564, 572. That a building is wholly occupied by an employer, whose business is partly interstate in character, or only partially occupied by such an employer, is immaterial with respect to the status under the Act of a building guard. It would seem that the instant case cannot be distinguished in character of fact from its predecessors in this court unless appellant's duties of guarding appellee's bank building are "so closely related to the movement of the commerce as to be a part of it." * * *

But for a rather remote possibility that the law would be violated by a person or persons violently and forcefully breaking into the bank premises with the intent of robbery, or that some emergency should

> arise as a fire or leaky pipe, the watchman's services could have no effect upon commerce, and even then the effect of the watchman's acts would be negative and not acts in commerce. He had no hand whatever in the affirmative acts which constitute commerce.

There is nothing stated in *Carrigan* v. *Provident Trust Co., supra,* which is inconsistent with the holding in *Walling* v. *Goldblatt Bros., Inc.,* 128 F. 2d 778.

Accordingly, we hold that none of the defendant's employees in the warehouses, with the exception of the seal-checking guards, is covered by the act.

As to the employees in defendant's central office, it appears that there is one employee who gives a substantial part of her time to making and receiving telephone calls to and from defendant's guards at the Goldblatt warehouses and stores, some of the latter being in the State of Indiana. It will be noted that these telephone calls are from and to persons entirely in the service of defendant. When employees talk to each other in performing their duties for their employer, they are not engaged in commerce as that word is used in the act now under consideration. That is true whether they sit at adjoining desks or are at the opposite ends of a telephone wire and regardless of whether that wire crosses state lines. This is still true even though another, who owns the wire, may be engaged in commerce in the transmitting of the sound of human voices over that wire. Section 3 of the act (29 U. S. C. § 203) declares that "commerce means trade, commerce, transportation, transmission, or communi-

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cation" interstate. As was said in *Fleming* v. *Jacksonville Paper Co.*, 128 F. 2d 395, at 398:

> Transportation is only a part of it. Trade is another part, and according to the old maxim, it takes two to make a trade. Importer as well as exporter, buyer as well as seller, is a participant; and ordering and paying for goods are included.

If it takes two to make a trade, these two must be the employer and another person or firm with which he is dealing. Communication means from one person to another; that is from the employer to some other person or firm. It cannot reasonably be said to mean a communication by one of the employees of an employer to another employee of the same employer. In the case at bar, the person doing the telephoning to points in another state did not call anyone outside of the defendant's own staff of employees. There was no communication within the definition of commerce contained in the act. Neither by the statutory definition nor as commonly understood does "commerce" include communication by word of mouth between the servants of a common employer in the course of the latter's business. Telephoning by an employee to persons not in the employer's organization, on behalf of his employer, for the benefit of a third party with whom the employer has a contract for such service, would be an act in commerce. But that is not the factual situation which confronts us. It follows that the telephoning done by the employee in question does not bring her under the act.

This conclusion is strengthened by the fact that this particular employee is not engaged in selling

and delivering across state lines or at buying and receiving across state lines, and hence would not fall within the category referred to in *Fleming* v. *Jacksonville Paper Co., supra,* at page 398, where the court said:

> Those who work either at selling or delivering across State lines, or at buying and receiving across State lines, are employed in commerce, whether they write the letters, keep the books, or load and unload or drive the trucks.

There are other employees in the central office of defendant. Their duties include the supervision of the various guards and watchmen stationed by defendant in the Goldblatt warehouses and stores, as well as the keeping of payroll records and the making of payments to said employees of salaries, less tax deductions. Inasmuch as the only employees in this group serviced by the central office who are engaged in interstate commerce are the seal-checking guards, of whom there are only three, and two watchmen at the Lexington bakery, which is engaged in production, and since the record is silent as to the amount of time actually expended by the employees in the central office in connection with these five employees, the plaintiff has not established that in connection therewith central office employees are devoting a substantial part of their time to these five employees (*Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, at 572 and hence this court cannot say that the said central office employees are covered by the act. In all other respects it is clear on this

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record that none of the central office employees of defendant is subject to the act.

For the reasons above stated, we conclude that as to the seal-checking guards the decree of the court below is affirmed and in all other respects it is reversed.

Affirmed in part; reversed in part.

2. *Judgment*

Monday, March 29, 1954

Before Hon. J. EARL MAJOR, *Chief Judge,* Hon. H. NATHAN SWAIM, *Circuit Judge,* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 10936

JAMES P. MITCHELL, SECRETARY OF LABOR, PLAINTIFF-APPELLEE,

v.

JOYCE AGENCY, INC., DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by Counsel.

On consideration whereof: It is ordered and adjudged by this Court that the Judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed as to the seal-checking guards, and that the said Judgment in all other respects be, and the same is hereby, reversed.

3. *Order denying rehearing*

Friday, April 23, 1954

United States Court of Appeals for the Seventh Circuit

CHICAGO 10, ILLINOIS

Before Hon. J. EARL MAJOR, *Chief Judge*, Hon. H. NATHAN SWAIM, *Circuit Judge*, Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 10936

JAMES P. MITCHELL, SECRETARY OF LABOR, PLAINTIFF-APPELLEE,

v.

JOYCE AGENCY, INC., DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN LISTRICT OF ILLINOIS, EASTERN DIVISION

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 230

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOYCE AGENCY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The memorandum opinion of the district court (R. 92–100) is reported at 110 F. Supp. 918, and the "Findings of Fact and Conclusions of Law" appear in the record at pages 100 to 118. The opinion of the court of appeals (R. 125–133) is reported at 211 F. 2d 241.

JURISDICTION

The judgment of the court of appeals (R. 133) was entered on March 29, 1954, and petitioner's petition for rehearing was denied on April 23,

1954 (R. 135). Certiorari was granted on October 14, 1954 (R. 137). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether guards and watchmen, and related clerical workers, employed to furnish theft and fire protection to the warehouses of an interstate chain-store organization, where large amounts of merchandise from out-of-State sources are regularly received, unloaded, packaged and otherwise handled, and shipped out of the State, are engaged "in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of October 26, 1949, c. 736, 63 Stat. 910; 29 U. S. C. 201 *et seq.*, are:

Definitions:

> Section 3 (63 Stat. 911): As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *

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(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * *

Maximum Hours:

Section 7 (63 Stat. 912):

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

STATEMENT

This action was brought by the Secretary of Labor pursuant to Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime provisions of the Act. The facts of the case were largely stipulated (Stipulation of Facts, R. 14–58), and the Findings of

Fact by the district court (R. 101–117) are undisputed.

1. Respondent, Joyce Agency, Inc., is an Illinois corporation with its central office and place of business in Chicago, engaged in the business of furnishing watchmen, guard, detective, and fire inspection services to the huge multimillion dollar interstate merchandise system of Goldblatt Brothers, Inc. (Fdg. 1; R. 101; opinion of dist. ct., R. 93).

Goldblatt Brothers, Inc. ("Goldblatt") owns and operates a chain of fourteen retail department stores, eleven of which are located in Illinois and three in Indiana, and four large warehouses in Illinois from which merchandise is distributed to the stores both in Illinois and Indiana (Fdgs. 2, 4, 5, 15, 27, 32; R. 101–102, 106, 110, 111). The total annual sales volume of Goldblatt's stores exceed $90,000,000 (Fdg. 2; R. 101). Most of this merchandise is distributed from the four warehouses directly to the stores by means of Goldblatt's own motor transportation system (Fdg. 3; R. 101, 93).

Each of the four warehouses regularly and daily receives in interstate commerce from points outside of the State of Illinois large quantities of merchandise, having an annual sales value of millions of dollars. A "very large percentage of these goods are distributed from the four warehouses directly to stores in Indiana" (R. 93). At the "Wentworth Warehouse," for example, more

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than 30 million dollars worth of merchandise is received and shipped per year, 70 percent of which is regularly received from out-of-State sources, and 20 percent of which is shipped to the Indiana stores (Fdg. 5; R. 102). At the "Ashland Warehouse and Garage," 12½ million dollars worth of merchandise is received and handled, 65 percent of which is regularly received from out-of-State sources, and 20 percent of which is shipped to the Indiana stores (Fdg. 15; R. 106). At the "63rd Street Warehouse", over 10 million dollars worth of merchandise is received and handled, 50 percent of which is received from out-of-State sources, and 17 percent of which is shipped to Indiana stores (Fdg. 27; R. 110). At the "Wabash Warehouse", more than 18 million dollars worth of merchandise is received and handled, 22 percent of which comes from out-of-State sources, and approximately 2 percent of which is shipped to Goldblatt customers outside of Illinois (Fdg. 32; R. 111).

In order to conduct this vast interstate business, Goldblatt operates and employs extensive instrumentalities of interstate commerce. It maintains its own "motor transportation system consisting of 127 trucks, 70 trailers, and 17 tractors" (Fdg. 3; R. 101, 93). Each of the four warehouses has huge receiving and shipping platforms and truck pits (R. 16–17, 29–30, 43, 47); they receive well in excess of 125 trucks and trailers each day

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(Fdgs. 8, 21, 30; R. 102, 107, 110, 47). Railroad sidings adjoin the "Wentworth", "Ashland" and "63rd Street" warehouses (R. 16, 29, 43); at these an average of 15 freight cars are received each week (R. 18, 32, 44).

Goldblatt employs approximately 400 employees at these four warehouses to receive, unload, check, handle, assemble, repack, and reship the merchandise (Fdgs. 7, 17, 29, 33; R. 102, 106, 110, 112). Typical of the operations involved at the Goldblatt warehouses are those performed at "Wentworth," which are summarized in the district court's Findings of Fact as follows: "The receiving department employees deposit these goods on the receiving platform and on freight elevators adjacent to and opening onto the railroad siding. Shipments from 50 to 60 trucks and trailers are received daily and an average of four railroad freight cars is received each week. 'Break-bulk' shipments, which are received daily, are taken after unloading directly from the receiving platform to the shipping platform for immediate forwarding to a particular Goldblatt store designated on the common carrier freight bill for such shipment. All other goods, after being unloaded, are moved to the various stock departments and are unpacked, counted, checked, marked, and placed in stock. Orders for all Goldblatt stores are filled from said stock departments in the following manner: The merchandise

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is picked from stock, placed in bins, checked and packed in containers, or placed on racks; sorted and checked by store, taken to the 'store runs' on the shipping platform, from which they are loaded onto Goldblatt's trucks and trailers, and transported to Goldblatt's stores, including the three Indiana stores. Orders not completely picked or packed by quitting time are left in that incompleted state in their respective stock departments until the next working day. Assembled goods are left in the 'store runs' until the next working day. Trucks or trailers which are loaded and sealed, partially loaded, or empty also remain in the warehouse until the next working day. An average of 75 Goldblatt trailers is loaded weekly at the shipping platform and of this number approximately 15 trailers a week go to Goldblatt's Indiana department stores. Goods are daily transported to Goldblatt's stores, including the stores in Hammond, Gary, and South Bend, Indiana" (Fdg. 8; R. 102–103).

2. Respondent Joyce Agency furnishes the watchmen and guards to protect the merchandise and the warehouses during all of these operations. While the individual duties of the guards, watchmen, and detectives vary somewhat at the different warehouses, the protection service rendered "is basically the same in all four warehouses" (dist. ct. opinion, R. 94). "The primary difference is found in the number of employees used by de-

fendant at the various warehouses to administer this protective service," which "seems to be determined by the volume of business activity at each establishment" (*ibid.*).

As the district court found, respondent Joyce Agency "offers Goldblatt Brothers a highly systematic protection service, which exceeds the normal watchman activity" and includes maintaining "a close watch over all stages of the respective operations on both the receiving and shipping platforms," as well as "patrol [of] the entire premises, guard[ing] the goods in all stages of being received, handled, stored, prepared for shipments and shipped including those enroute to the shipping platform and on the receiving and shipping platforms, as well as in the railroad cars and motor trucks and trailers in the truck pit, together with the cars, trucks and trailers themselves from fire, theft and other damage" (R. 94).

The close integration of the duties of respondent's employees in the warehouse operations of Goldblatt is well illustrated by the district court's finding as to the procedure for handling valuable goods at the "Wentworth" warehouse (Fdg. 11; R. 103–104). The shipping platform guard takes "personal custody" of these "'valuable goods' (goods particularly susceptible to theft, such as cigarettes, furs, jewelry, guns, and nylon hosiery) * * * at a designated place on the shipping platform, guarding them at all times while they are

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on the platform and throughout the loading process until the trailer is locked and sealed, and then preparing a shipment memorandum listing the nature of the goods being shipped, department number, number of pieces, bill number, trailer number, and seal number. He gives this memorandum to the [respondent's] Wentworth Warehouse front door guard, who transmits this information to [respondent's] guard or special service man stationed at the Goldblatt store to which the goods are being shipped" (Fdg. 11; R. 103–104).

Respondent coordinates the service it renders to Goldblatt through a central office in Chicago which performs "the administrative work integrating [respondent's] furnishing of night watchman, guard, detective, fire inspection, and shopping service to Goldblatt" (Fdg. 36; R. 113). Since respondent testified that it had only one other client to whom it furnished two or three persons out of a payroll of 85 people (R. 70–71), practically the entire work of the bookkeepers, statement clerk, and switchboard operator concerned herein was in connection with the service rendered to Goldblatt.

The duties of the switchboard operator have been performed by the bookkeeper four days and by the statement clerk one day each week (Fdgs. 37, 38, 39; R. 113–115). As switchboard operator, the bookkeeper and statement clerk "handle all incoming and outgoing calls through the switch-

board in [respondent's] central office, including all calls between [respondent's] central office and [respondent's] employees stationed in all Goldblatt warehouses and stores" (Fdg. 39; R. 114). Calls to and from Goldblatt's Indiana stores are placed daily through the switchboard at Goldblatt's State Street store in Chicago which has a direct line to each of them (Fdg. 39; R. 114, 64–65). "Employees in respondent's central office also make calls to and receive calls from points in States other than Illinois and Indiana, depending on the circumstances of the business" (Fdg. 39; R. 115).

3. The district court held that the Act covered all of respondent's guards and watchmen employed at Goldblatt's warehouses, and the clerical workers performing the administrative work in connection with furnishing such guards, including the switchboard operator (R. 117). The activities of respondent's guards and watchmen in the various warehouses, concluded the district court, "contribute so materially and directly to interstate commerce as to be a part thereof * * *. They are the integral components of a highly systematic security system which is as important and vital part of this commerce as traffic control and other warehousing and shipping techniques. This is borne out by the fact that the protection service is given not only at the warehouse premises but also during the course of transportation

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itself, by means of telephonic communications regarding shipments to designated stores. The fact that the night watchmen assume none of these operational duties, but are limited, more or less, to the patrolling and guarding of the premises during the night hours does not withdraw them from interstate commerce. They guard against fire, theft, and other hazards, during a time of greater need, not only the wares, which are in the process of being received as well as shipped in interstate commerce, but also the vehicles, which are the instrumentalities of that commerce" (R. 95–96).

The trial court concluded that the guards at the warehouse were also engaged "in the production of goods for commerce because they are engaged in a 'closely related process or occupation directly essential to the production' of goods for commerce which is being carried on at the various warehouses" (R. 96). Respondent's employees at its central office were also held by the trial court to be engaged in both interstate commerce and production of goods for commerce, both by reason of their direct "interstate telephone activity" and "interstate use of the mails" as well as by reason of the fact that their activities "effectuate the coordination, integration and orderly administration of the defendant's protection service at the warehouses, where there is production of goods for commerce" (R. 97–98).

4. The court of appeals reversed on the ground that neither guards and watchmen employed at Goldblatt's warehouses where goods are regularly received, handled and shipped in interstate commerce, nor the office and clerical employees performing the necessary administrative work in connection with furnishing such guard service, are engaged "in commerce" within the meaning of the Act (R. 131, 133); that coverage cannot be sustained for these employees on "production" grounds since Goldblatt's handling of goods in this case does not constitute "production" (R. 129); and that the making of interstate telephone calls between employees of the same employer is not "communication" in interstate commerce (R. 132).

Out of a total of approximately 85 employees, the only employees held covered by the court of appeals were two guards at Goldblatt's bakery (who were conceded to be engaged in production of goods for commerce), and three "seal-checking guards," who check the lock and seals on trucks before permitting them to unload or to leave the warehouses when loaded. The office and clerical employees were disposed of on the ground the the record did not establish that they "are devoting a substantial part of their time to these five employees" (R. 133). The other guards, the court stated, "do not physically handle the goods received or shipped" (R. 126).

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SUMMARY OF ARGUMENT

The unchallenged findings of fact establish that respondent's employees furnished fire and theft protection to the extensive interstate operations continuously carried on at the warehouses of the Goldblatt Company's huge interstate chain of department stores; that they furnish this protection to the "goods in all stages of being received, handled, stored, prepared for shipments and shipped," and to "all stages of the respective operations on both the receiving and shipping platforms"; and that this protection is an "integral" and "vital part" of the interstate warehousing and shipping operations (R. 94, 95). On these facts, respondent's guards and related clerical workers are clearly "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

A

1. It is well settled by this Court's decisions that warehouse employees of an interstate chain-store organization engaged in receiving and unloading out-of-State shipments and in preparing goods for shipment across state lines, and central office and clerical employees whose work relates substantially to such interstate activities, are engaged "in commerce." *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Phillips Co.* v. *Walling*, 324 U. S. 490. The very warehouse activities

for which respondent's employees here furnish protection services have specifically been held to be "in commerce" in previous litigation. *Walling* v. *Goldblatt Bros.*, 128 F. 2d 778 (C. A. 7), certiorari denied, 318 U. S. 757; 152 F. 2d 475 (C. A. 7), certiorari denied, 328 U. S. 854; reaffirmed in *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329, 331 (C. A. 7), certiorari denied, 332 U. S. 855. The fire and theft protection functions here are plainly no less a part of the interstate commerce at the warehouses than the work of the warehouse and office employees in the *Jacksonville Paper* and *Phillips* cases, *supra*, and, as in *Phillips*, respondent's employees perform these functions "in the very midst of the stream of interstate commerce" (324 U. S. at 497).

The courts of appeals, including the Seventh Circuit itself prior to its decision in the instant case, have consistently held that guards and watchmen protecting interstate distribution of goods and premises and facilities used in interstate transportation are engaged "in commerce." *Walling* v. *American Stores Co.*, 133 F. 2d 840 (C. A. 3) affirming 42 F. Supp. 511, 524 (E. D. Pa.); *Walling* v. *Sondock*, 132 F. 2d 77 (C. A. 5), certiorari denied, 318 U. S. 772; *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5); *Engebretsen* v. *E. J. Albrecht Co.*, 150 F. 2d 602 (C. A. 7); *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4); *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (C. A. 4). The *American Stores*, *Russell*, and *Sondock* cases concerned watchmen guarding interstate distribution

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transactions indistinguishable from those in the instant case. The opinion of the court of appeals below makes no attempt to distinguish these cases, which are squarely in point factually and clearly represent a correct application of this Court's decisions construing the scope of the "in commerce" coverage.

2. Instead, the court below erroneously relied upon two cases which involved entirely different factual situations and are wholly inapposite here. *Carrigan* v. *Provident Trust Co.*, 153 F. 2d 74 (C. A. 3) and *McLeod* v. *Threlkeld*, 319 U. S. 491. There is also an untenable implication in the decision below (limiting coverage to the "seal checking guards") that the "in commerce" coverage is limited to those "physically" in contact with the goods or vehicles moving in commerce. The above cited authorities and numerous other decisions make it clear that it is not such physical contact, but the employee's practical and integrated participation in the commerce, that controls determination of coverage.

Similarly, it is settled that employees who are themselves engaged in commerce are not removed from coverage because their employer may not be directly or wholly engaged "in an industry partaking of interstate commerce". "The provisions of the Act expressly make its application dependent upon the character of the employees' activities". *Kirschbaum Co.* v. *Walling*, and *Arsenal Building Corp.* v. *Walling*, 316 U. S. 517, 524;

Walling v. *Jacksonville Paper Co.*, 317 U. S. 564; *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 184–185; see also *Mitchell* v. *Famous Realty, Inc.*, 211 F. 2d 198 (C. A. 2), certiorari denied, No. 141, this Term, October 14, 1954, and *Walling* v. *Sondock, supra,* both involving watchmen furnished by an agency which was not itself engaged in an interstate business.

B

1. Respondent's employees are also engaged "in the production of goods for commerce" since their duties are closely related and directly essential to the handling and preparation of goods for shipment in interstate commerce. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 525; *Borden Co.* v. *Borella,* 325 U. S. 679; *Walton* v. *Southern Package Corp.,* 320 U. S. 540; *Armour & Co.* v. *Wantock,* 323 U. S. 126; *Schulte Co.* v. *Gangi,* 328 U. S. 108.

The court below was plainly in error in holding these decisions inapplicable on the ground that the handling of goods at the warehouses does not constitute "production" because it does "nothing to affect the character of the articles themselves" (R. 129). The word "produced" is broadly defined in the Act to include "handled, or in any other manner worked on" (Section 3 (j)), and it has been settled by this Court that this definition is not limited to "the manual, physical labor in-

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volved in changing the form or utility of a tangible article" (*Borden Co.* v. *Borella*, 325 U. S. 679, 683), but "includes every kind of incidental operation preparatory to putting goods into the stream of commerce," "whether manufacture or not" (*Western Union* v. *Lenroot*, 323 U. S. 490, 503). In the *Borden* case the definition of "production" was held applicable to the maintenance and custodial employees of Borden Company's administrative office building, where "the articles themselves" were in no way physically handled.

The decisions of other courts of appeals, and prior decisions of the Seventh Circuit, have repeatedly held that the very type of warehouse handling of goods here involved constitutes "the production of goods for commerce" within the statutory definition. *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C. A. 8); *Walling* v. *Friend*, 156 F. 2d 429 (C. A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C. A. 8); see also *Mitchell* v. *Famous Realty, Inc.*, 211 F. 2d 198 (C. A. 2), certiorari denied, No. 141, this Term, October 14, 1954; *Bracey* v. *Luray*, 138 F. 2d 8 (C. A. 4); *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5); *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475, 476 (C. A. 7), certiorari denied, 328 U. S. 854; *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329 (C. A. 7), certiorari denied, 332 U. S. 855; *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369 (C. A. 7), vacated as moot, 326 U. S. 690. The identical warehousing functions here in issue

were held by the Seventh Circuit to constitute "production" in previous litigation with the Goldblatt Company. *Walling* v. *Goldblatt Bros., supra,* reaffirmed in the *Blue Star* case, *supra.*

The opinion below misconstrued the *Western Union* decision. The only exception which *Western Union* made to the inclusion of all "handling" within the scope of the statutory definition of "produced" was the handling "which accomplishes the interstate transit or movement in commerce itself," by a common carrier engaged in the business of transporting goods of others.

2. The 1949 Amendments to the Act, which included a modification of Section 3 (j), did not diminish the authoritative value of the above decisions sustaining coverage for guards and clerical employees. On the contrary, the Conference Reports of both Houses of Congress expressly stated the purpose to continue coverage of employees furnishing protective or custodial services for producers of goods, whether employed by the producer himself or by an independent agency.

C

The ruling below that respondent's switchboard operator is not engaged in commerce, because the interstate calls were between employees of the same employer rather than for "trade" purposes, ignores the plain language of the statutory definition of "commerce," which is not limited to "trade," but also includes "transportation, trans-

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mission, or *communication*" (Section 3 (b); emphasis added), and is contrary to the settled judicial interpretation that interstate commerce under the Act is not limited to interstate trade. *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497; *Bodden* v. *McCormick Shipping Corp.*, 188 F. 2d 773 (C. A. 5); *Fox* v. *Summit King Mines*, 143 F. 2d 926 (C. A. 9); *Darr* v. *Mutual Life Insurance Co.*, 169 F. 2d 262 (C. A. 2), certiorari denied, 335 U. S. 871; *Bell* v. *Porter*, 159 F. 2d 117 (C. A. 7), certiorari denied, 330 U. S. 813.

ARGUMENT

RESPONDENT'S GUARDS AND RELATED CLERICAL WORKERS FURNISHING THEFT AND FIRE PROTECTION TO AN INTERSTATE CHAIN ORGANIZATION'S WAREHOUSES AND TRANSPORTATION FACILITIES, WHICH ARE USED DAILY IN THE RECEIPT AND SHIPMENT OF SUBSTANTIAL AMOUNTS OF MERCHANDISE FROM AND TO OUT-OF-STATE POINTS, ARE ENGAGED "IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT

A. RESPONDENT'S EMPLOYEES ARE ENGAGED "IN COMMERCE"

The court of appeals has held that some 80 of respondent's employees connected with the Goldblatt warehouses—guards and watchmen, and the related clerical and administrative personnel (bookkeepers, statement clerk, switchboard operator) (see *supra*, pp. 7–10)—are not "engaged in commerce" and therefore not covered by the

Fair Labor Standards Act.[1] This ruling flatly disregards both the trial court's unchallenged findings and the settled holdings of this and other courts in applying the Act to comparable situations.

1. In findings undisputed by respondent, the district court found that in the conduct of its vast interstate chain of department stores Goldblatt relies on respondent's highly systematic protection service as an "integral" and "vital" part of its interstate warehousing and shipping operations; and that this protection service exceeds the normal watchman activity and includes the responsibility of guarding the "goods in all stages of being received, handled, stored, prepared for shipments and shipped," as well as the premises, trucks, trailers and railroad cars, and of maintaining "a close watch over all stages of the respective operations on both the receiving and shipping platforms" (R. 94).

Concededly, it has been settled in previous extensive litigation that the "in commerce" coverage of the Act extends to the receiving and unloading of out-of-State shipments at Goldblatt's warehouses and to the warehouse activities relating to goods being shipped out of the State.

[1] The coverage of the Fair Labor Standards Act extends to (a) employees "engaged in commerce", as well as (b) to those engaged "in the production of goods for commerce". Section 7, *supra*, p. 3. We discuss "production of goods for commerce" in Point B, *infra*, pp. 33 *ff*.

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Walling v. *Goldblatt Bros.*, 128 F. 2d 778 (C. A. 7), certiorari denied, 318 U. S. 757; 152 F. 2d 475 (C. A. 7), certiorari denied, 328 U. S. 854; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (warehouse employees of wholesale paper company). And it seems equally well settled that this coverage includes central office employees "who work either at selling or delivering across State lines, or at buying and receiving across State lines * * * *whether they write the letters, keep the books,* or load or unload or drive the trucks." [Emphasis added.] *Fleming* v. *Jacksonville Paper Co.*, 128 F. 2d 395, 398 (C. A. 5), affirmed, 317 U. S. 564; *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329, 331 (C. A. 7), certiorari denied, 332 U. S. 855; See also, to the same effect, *Phillips Co.* v. *Walling*, 324 U. S. 490 (warehouse and central office employees of an interstate retail chain store system); *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572, rehearing denied, 317 U. S. 706 (rate clerk for interstate motor transportation company).

Like the central office and warehouse employees in the *Phillips* case, *supra*, respondent's employees "are performing wholesale duties in the very midst of the stream of interstate commerce" and "constantly deal with both incoming and outgoing interstate shipments." 324 U. S. at 497–498. And there is no question that a "substantial part" of the activities of respondent's employees has

"related to goods whose movement in the channels of interstate commerce was established by the test" prescribed by this Court in the *Jacksonville Paper* case, *supra*, 317 U. S. at 572.[2] The fire and theft protection functions performed by the employees, which the trial court found to be an "integral" and "vital" part "in all stages" of the interstate commerce at the warehouses (R. 95) (see *supra*, pp. 10–11), are plainly no less a part of that commerce than the writing of letters or keeping of books relating to it. This has been repeatedly and consistently recognized by decisions of various courts of appeals, including the Seventh Circuit itself prior to its ruling in the instant case.

Thus, in *Walling* v. *American Stores Co.*, 133 F. 2d 840, the Third Circuit, in a decision squarely in point here, held that watchmen employed at

[2] The *Jacksonville Paper* test was as follows (317 U. S. at 568): "* * * once the goods entered the channels of interstate commerce, Congress [did not stop short] of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. * * * if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient."

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the warehouse of a chain grocery—to protect precisely the same kind of interstate facilities and receiving, unloading, and checking operations as are here involved—were engaged "in commerce," even when the warehouse did not engage in the additional interstate activity, here present, of making deliveries across state lines. The court said that, since under the principles of the *Jacksonville Paper* case there was a "practical continuity of movement of the goods until they reach the defendant's stores," the conclusion "is that *all* of the defendant's warehouse employees are engaged in commerce within the meaning of the Act" (133 F. 2d at 846). [Emphasis added.] Therefore, in addition to extending coverage to some employees not included by the trial court, it affirmed the trial court's holding that "All employees who rendered services in connection with incoming goods (whether in the actual physical handling of the goods *or in the compilation of records or other operations* pertaining to incoming goods) are subject to the provisions of the Act," including specifically "maintenance men, *watchmen* and janitors * * *" (42 F. Supp. at 524, 525). [Emphasis added.]

And in *Engebretsen* v. *E. J. Albrecht Co.*, 150 F. 2d 602, the Seventh Circuit held that a watchman at the equipment and storage yard of an interstate construction company was engaged "in commerce." Immediately after citing and dis-

cussing *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4), and other "in commerce" cases, the opinion stated (150 F. 2d, at 606):

> *Under repeated decisions* plaintiff's employment as watchman and caretaker was of such character and so intimately connected with the tools and equipment which passed into interstate commerce that it can be properly held that his services were so *essential to such commerce as to become a part thereof* * * *.[3] [Emphasis added.]

In *Slover* v. *Wathen, supra,* on which the Seventh Circuit relied, the Fourth Circuit had held that a watchman guarding interstate barges while under repair was "so closely related to the movement of commerce as to be a part of it within the test prescribed by the Supreme Court * * *" (140 F. 2d at 259). And in *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286, the Fourth Circuit similarly held that the "in commerce" coverage in-

[3] The importance of this holding on "in commerce" coverage was emphasized on remand when the defendant sought to prove that "production" coverage was not applicable. The district court considered this offer of proof immaterial because "the defendant's liability can be predicated on *the sole ground of its having been engaged ir interstate commerce.* The Circuit Court of Appeals, on facts admitted by the defendant * * * held that the District Court was in error in holding that the defendant was not engaged in interstate commerce." *Engebretsen* v. *E. J. Albrecht Co.*, 5 W. H. Cases 900, 10 Labor Cases Par. 63,001 (N. D. Ill.—1946). [Emphasis added.]

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cluded a watchman guarding the construction of a new highway bridge.

Even more squarely applicable are the Fifth Circuit's decisions in *Walling* v. *Sondock*, 132 F. 2d 77 (C. A. 5), certiorari denied, 318 U. S. 772, and *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5). Like the Third Circuit's decision in *American Stores, supra*, pp. 22–23, these cases are practically indistinguishable from the instant case; indeed, the factual situation now before the Court affords an even stronger basis for coverage. In *Sondock*, as here, a watchman agency was involved. It rendered services generally to interstate wholesalers and distributors as well as to producers of goods for commerce. The Fifth Circuit held that the watchmen who guarded and protected the interstate distribution transactions were engaged "in commerce." The same result was reached in the *Russell* case where the Fifth Circuit reaffirmed its holding that "night watchmen who guarded and protected interstate distribution transactions were 'engaged in commerce' " (187 F. 2d at 526).

The *Sondock* decision states the test for determining coverage in this type of case as follows: "* * * * if an employee's services are part of and contribute materially to the consummation of transactions in interstate commerce, the employee is engaged in commerce as defined by the Act" (132 F. 2d at 78). The services performed

by the employees in this case meet that test *a fortiori,* since they are performed exclusively for and are directly integrated into Goldblatt's extensive interstate transactions, and, as the trial court found, are "as important and vital part of this commerce as traffic control and other warehousing and shipping techniques" (R. 95). Respondent's employees protect the very facilities used in the interstate transportation of Goldblatt's goods, at the very time the goods are in the course of interstate movement. Goldblatt employs extensive instrumentalities of commerce in the conduct of its vast interstate business (*supra,* pp. 5–6). It maintains its own "motor transportation system consisting of 127 trucks, 70 trailers, and 17 tractors" (Fdg. 3, R. 101), and has railroad sidings at the "Wentworth," "Ashland," and "63rd Street" warehouses (R. 16, 29, 43). Large receiving and shipping platforms and truckpits adjoin each warehouse[4] (R. 16–17, 29–30, 43, 47). These receive well in excess of 125 trucks and

[4] Indeed, the warehouses (R. 15–17, 29, 31, 42–43, 47) themselves may well be regarded as "instrumentalities of commerce." They perform a service in the interstate movement of goods similar to that which railroad and bus stations perform in the interstate movement of people. The courts have consistently held the "in commerce" coverage under this Act applicable to the maintenance personnel of such terminal facilities. *Hargis* v. *Wabash Railroad Co.*, 163 F. 2d 608 (C. A. 7); *Mornford* v. *Andrews*, 151 F. 2d 511 (C. A. 5); *Walling* v. *Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E. D. S. C.); *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52 (W. D. Mo.).

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trailers each day (Fdg. 8, 21, 30; R. 102, 107, 116, 47), and an average of 15 freight cars each week (R. 18, 32, 44), transporting goods, more than half of which comes from outside of the State (*supra*, pp. 5–7). These extensive instrumentalities of commerce are certainly embraced within "the farthest reaches of the channels of interstate commerce" throughout which "it is clear that the purpose of the Act was to extend federal control." *Overstreet* v. *North Shore Corp.*, 318 U. S. at 128; *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U. S. 740; *Boutell* v. *Walling*, 327 U. S. 463.

2. The Seventh Circuit in its opinion below made no attempt to distinguish the decisions which involved factual situations closely paralleling the facts of the instant case. It relied instead on *Carrigan* v. *Provident Trust Co.*, 153 F. 2d 74 (C. A. 3), and *McLeod* v. *Threlkeld*, 319 U. S. 491, both of which involved entirely different factual situations.

The *Carrigan* case concerned a night watchman at the branch office of a bank. There were no findings by the trial court that the duties of this watchman had any connection with the interstate aspects of the banking business, and the court of appeals, in affirming the trial court's ruling of no coverage, emphasized that "No act within the scope" of the night watchman's "duty touches any facet of the acts of commerce in which the

bank was engaged" (153 F. 2d at 76). In contrast, here the district court's findings specified in detail how the guards "maintain a close watch over all stages of the respective operations on both the receiving and shipping platforms" and the "important and vital part" their functions serve in the extensive interstate commerce continuously passing through the warehouses. *Supra*, pp. 8–9, 10–11.

McLeod v. *Threlkeld*, 319 U. S. 491, the other case relied upon by the court of appeals below, is even less pertinent. The cook there held not covered by the Act was not himself participating in the interstate transportation of goods or in the maintenance and operation of the interstate instrumentalities themselves; he was simply supplying the personal needs of employees who were so engaged. On the other hand, the employees here, who furnish protection directly to the interstate movement of goods "not only at the warehouse premises but also during the course of transportation itself" (R. 95), "have the immediacy of participancy lacking in the cook of *McLeod* v. *Threlkeld.*" See *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334, 337 (C. A. 9). They are "so closely related to the movement of commerce as to be a part of it within the test prescribed by the Supreme Court in *McLeod* v. *Threlkeld* * * *." *Slover* v. *Wathen*, 140 F. 2d 258, 259 (C. A. 4).

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The suggestion implicit in the decision below (limiting coverage to the "seal checking guards") that the "in commerce" coverage of the Act is restricted to those "physically" in contact with the goods or vehicles moving in interstate commerce (R. 126, 131) is plainly untenable.[5] This Court and the various courts of appeals have repeatedly held "in commerce" coverage available to employees whose physical proximity to the interstate instrumentality or the goods moving in commerce was no closer than that of respondent's employees in the instant case. See *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, affirming the decision of the Fifth Circuit applying the "in commerce" coverage to those who "write the letters, keep the books", as well as to those who "load and unload or drive the trucks." 128 F. 2d 395, 398; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, rehearing denied, 317 U. S. 706, recognizing that a rate clerk for an interstate motor carrier was "engaged in commerce;" *Phillips Co.* v. *Walling*, 324 U. S. 490, affirming coverage of central office employees of a chain store organization. See also *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334, 337 (C. A. 9) (holding the Act applicable to "white collar" workers physically removed from the in-

[5] Respondent makes the same argument (Br. in Opp., pp. 4, 7, 16) in the form of urging that even though a guard may be employed at an establishment involved in commerce his activities are too remote to make his work part of that commerce.

strumentality of commerce on which the construction was being done); *Laudadio* v. *White Construction Co.*, 163 F. 2d 383 (C. A. 2) (applying the Act to estimators and draftsmen performing preparatory paper work for construction work on the instrumentality of commerce); *Walling* v. *Sondock*, 132 F. 2d 77 (C. A. 5), and *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5) (discussed *supra*, pp. 25–26); *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4) (holding covered a watchman guarding interstate barges withdrawn from commerce while under repair); *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (C. A. 4) (upholding coverage of a watchman employed to guard the construction of a new bridge which had never carried interstate traffic and was some distance removed from the highways then being used to carry such traffic, but which when completed was to connect with roads leading to interstate highways).[6]

[6] The *Bennett* and *Slover* cases, among others, plainly show the fallacy in respondent's argument that there have been no holdings in "in commerce" cases that watchmen are covered. Respondent has included in its brief in opposition a chart of cases (pp. 5–6) which, it contends, supports its argument that watchmen and guards are covered by the Act only when the employer is engaged in the production of goods for commerce (pp. 4, 7, 16). In the text we have pointed out the incorrectness of this view both on principle and on authority. With the exception of the *Sondock* case, the chart omits those cases most directly in point; *i. e.*, the decisions holding that the employees of watchman and guard agencies guarding interstate transactions and facilities are engaged in commerce. See *supra*, pp. 22–25, and *infra*, p. 33. The *Sondock* case is listed as holding that the watchmen and

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From any "practical" and realistic point of view, the work of respondent's employees is certainly as "intimately related to interstate commerce" and as much "a part of it" (see *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, at 128, 130) as the work of any of the employees held covered in the above cases. It is clear from the decisions construing the "in commerce" coverage

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guards are engaged in the production of goods for commerce, but the chart does not show that the court also held certain watchmen were engaged in commerce. *Supra*, p. 25. The same omission is made with respect to the *Russell* and *Slover* cases. In the other cases listed in which the watchmen were held to be engaged in the production of goods for commerce, the courts made no holding, one way or the other, regarding "in commerce" coverage.

10 East 40th St. Co. v. *Callus*, 325 U. S. 578, is treated as an "in commerce" case, despite the fact that this Court's decision was plainly premised on the assumption that only the "production" phase of coverage was involved when it ruled that the maintenance employees of an office building occupied by an unrestricted variety of tenants were "too many steps removed from the physical process of the *production of goods* [emphasis added]". The same error is made with respect to *Bartholome* v. *Baltimore Fire Patrol and Despatch Co.*, 48 F. Supp. 98 (D. Md.).

The chart also includes a number of cases such as *Carrigan* v. *Provident Trust Co. of Philadelphia*, 153 F. 2d 74 (C. A. 3), holding that maintenance employees in general office and bank buildings are not engaged "in commerce," because "No act within the scope" of their "duty touches any facet of the acts of commerce in which the bank was engaged" (153 F. 2d at 76). See *supra*, pp. 27–28. In contrast to such cases, the guards and watchmen in the instant case were found by the district court, as we have shown, to be "the integral components of a highly systematic security system which is as important and vital part of this commerce as traffic control and other warehousing and shipping techniques" (R. 95).

of the Act that it is not the physical contact of the employee to the actual movement in commerce, but his practical and integrated participation in "the proper functioning" of this commerce, that controls determination of coverage. See the *Overstreet* case, *ibid.* The unchallenged findings of fact of the trial court conclusively show that respondent's employees meet this practical test.[7]

Nor are these employees removed from coverage because their employer is not Goldblatt, which is plainly engaged in interstate commerce, but the respondent Agency, which may or may not itself be directly so engaged. As the court below expressly recognized (R. 129–130), the test is the employee's own activities and not the employer's general business. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 524; *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 571–2; *Overstreet* v. *North Shore Corp.,* 318 U. S. 125, 132; *Mabee* v. *White Plains Pub. Co.,* 327 U. S. 178, 184–5; *McLeod* v. *Threkeld,* 319 U. S. 491, 497. "The applicability of the Act is dependent on the character of the employees' work." *Walling* v. *Jacksonville Paper Co., supra,* at 571. Since, as we have

[7] The court below has made it clear (R. 133) that it excluded most of the central office employees solely because, in its view, the great majority of respondent's employees at the warehouses, who were serviced by the central office employees, were not engaged in commerce or in the production of goods for commerce. If, as we urge, the warehouse employees are held covered, even the court below would presumably hold the Act applicable to the others.

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shown, respondent's employees are themselves engaged in commerce by virtue of their connection with Goldblatt's activities in commerce, they are covered regardless of what characterization may be given to respondent's business as a whole. This has been the holding in several comparable cases, including *Walling* v. *Sondock,* 132 F. 2d 77 (C. A. 5), certiorari denied, 318 U. S. 772 (discussed *supra,* pp. 25–26), and *Mitchell* v. *Famous Realty, Inc.,* 211 F. 2d 198 (C. A. 2), certiorari denied, No. 141, this Term, October 14, 1954, involving similar guard and protective agencies.[8] See also *Kirschbaum Co.* v. *Walling,* 316 U. S. 517 (employees of loft building owner whose tenants were engaged in production of goods for commerce); see *infra,* pp. 42–43, for express Congressional recognition and confirmation of this principle.

B. RESPONDENT'S EMPLOYEES ARE ALSO ENGAGED "IN THE PRODUCTION OF GOODS FOR COMMERCE"

A separate and independent ground of coverage is that respondent's employees are "engaged * * * in the production of goods for com-

[8] The same conclusion has been reached by district courts in cases involving employees of independent watchman agencies. *Walling* v. *New Orleans Private Patrol Service,* 57 F. Supp. 143 (E. D. La.); *Walling* v. *Wattam's Patrol Service,* 3 WH Cases 726, 8 Labor Cases Para. 62,023 (W. D. Tenn. 1943); *Haley* v. *Central Watch Service,* 4 WH Cases 158, 8 Labor Cases, Para. 62,002 (N. D. Ill. 1944); *Walling* v. *Lum,* 4 WH Cases 465, 8 Labor Cases Para. 62,185 (S. D. Miss. 1944).

merce". The Seventh Circuit also rejected this contention on grounds which depart radically from the accepted principles applicable to the Act.

1. Respondent concedes, as it must, that "guards and watchmen * * * whose duties are performed at an establishment which produces goods for commerce" are covered by the Act (Br. in Opp., p. 7). The work of such guards, as this Court has repeatedly held, has "a close and immediate tie with the process of production for commerce" and is therefore "an essential part of it." *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 525, 526; *Borden Co.* v. *Borella,* 325 U. S. 679; *Walton* v. *Southern Package Corp.,* 320 U. S. 540; *Armour & Co.* v. *Wantock,* 323 U. S. 126; *Schulte Co.* v. *Gangi,* 328 U. S. 108. The court below refused to follow these decisions on the ground that Goldblatt's warehouses are not used in the production of goods for commerce, because, in handling and otherwise preparing goods for shipment in commerce, Goldblatt's warehouse employees "do nothing to affect the character of the articles themselves" (R. 129). The decision rested on this ground, despite the Seventh Circuit's own previous holding in an action against Goldblatt, that the latter's warehouse employees engaged in "unloading and checking" and otherwise "handling" goods in the course of their interstate movement, or engaged in "servicing"

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the warehouses "where such processed goods were handled", were "all engaged in the production of goods for commerce or in an occupation necessary to such production * * *". *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475, at 476, certiorari denied, 328 U. S. 854.

We submit that the Seventh Circuit's previous ruling in the *Goldblatt* case is correct, and that it follows from the above cited decisions of this Court, that the protective functions performed by respondent's employees are covered by the Act as a "close and immediate" and "essential part" of the production.

The word "produced" is defined in the Act to mean not only "produced, manufactured, mined" but also "handled, or in any other manner worked on" (Section 3 (j) *supra*, p. 3). The breadth of this definition is not only self-evident, but has been confirmed by this Court's decisions in *Western Union* v. *Lenroot*, 323 U. S. 490, and *Borden Co.* v. *Borella*, 325 U. S. 679, *supra*. As was said in those decisions, the definition is not limited to "the manual, physical labor involved in changing the form or utility of a tangible article" (325 U. S. at 683), but "includes every kind of incidental operation preparatory to putting goods into the stream of commerce," "*whether manufacture or not*" (323 U. S. at 503; emphasis added). In the *Borden* case, which dealt with the coverage of maintenance and cus-

todial employees of the Borden Company's administrative office building where "the articles themselves" were in no way physically handled, the Court emphasized that production as defined in Section 3 (j) "is *not* simply the manual, physical labor involved in changing the form or utility of a tangible article" (325 U. S. at 683). [Emphasis added.] Thus, the guards and maintenance employees held by this Court to be within the coverage of the Act in the *Borden* and the other cases cited above are indistinguishable from the employees involved in the instant case. Certainly they were no more closely integrated with the physical "production" activity involved, and in some cases were far less closely integrated.

The reasoning by which the court below reached an opposite conclusion in the instant case, limiting the meaning of "production" to manufacture or fabrication, is thus plainly inconsistent with this Court's decisions. Moreover, decisions of other appellate courts have repeatedly held that warehousing functions of the very type here involved constitute the "production of goods for commerce." *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766 (C. A. 8); *Walling* v. *Friend*, 156 F. 2d 429 (C. A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C. A. 8); see also *Mitchell* v. *Famous Realty, Inc.*, 211 F. 2d 198 (C. A. 2), certiorari denied, No. 141, this Term, October 14, 1954; *Bracey* v. *Luray*, 138 F. 2d 8 (C. A. 4); *Russell Co.* v. *McComb*, 187

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F. 2d 524 (C. A. 5). Indeed, until its decision in the instant case, the Seventh Circuit was itself a leading exponent of the view that the handling of goods in the course of their distribution constitutes "production." *Walling* v. *Goldblatt Bros.*, 152 F. 2d 475, 476, certiorari denied, 328 U. S. 854; *McComb* v. *Blue Star Auto Stores*, 164 F. 2d 329, certiorari denied, 332 U. S. 855; *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369, vacated as moot, 326 U. S. 690.

The *Wyandotte, Mutual Wholesale, Blue Star,* and *Montgomery Ward* cases, like the instant case, all involved chain-store organizations engaged in distributing goods manufactured by others. In all of them, just as here, the goods were handled in the course of receiving and shipping them into and out of the warehouses which served the selling outlets. Thus, the warehouse employees in *Wyandotte* were engaged in moving the goods into the warehouse, uncrating them, setting them up, repairing them, putting them in their proper space, taking them out to the platform and other similar handling. All of this work was held to have an "economic significance in relation to [the goods'] being made a part of the stock of the Kansas store and plainly constituted the production of goods for commerce within the definition of section 3 (j) of the Act" (169 F. 2d at 769). Similarly, in *Mutual Wholesale,* where merchandise was repackaged, it was held that such work

was "within that portion of the definition of 'produced' * * * which is expressed as 'handled, or in any other manner worked on in any State'" (141 F. 2d at 340).

The *Friend* case, though involving a livestock dealer and not a chain-store organization, is also directly in point since the employer was not engaged in raising livestock but in selling it, which required such handling activities as sorting and grading. There, the Eighth Circuit said (156 F. 2d at 431): "Thus it appears that Congress intended the term 'production of goods for commerce' to be comprehensive and to include every incidental operation preparatory to putting goods into the stream of commerce," citing *Western Union* v. *Lenroot,* 323 U. S. 490.

As stated above, the Seventh Circuit itself had held such warehousing functions, indeed the very functions here in issue, to constitute "production" within the meaning of this Act. In the second appeal of the action against *Goldblatt,* the court pointed out explicitly:

> * * * this court held * * * employees [in Goldblatt's warehouses] engaged in unloading and checking goods shipped in interstate commerce, and handling them on the platforms, those engaged in shipping such goods from warehouses in Illinois to stores in another State, those engaged in making up goods for sale in the stores in either state, and in the operation, main-

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> tenance and servicing of certain warehouses where such processed goods were handled *were all engaged in the production of goods for commerce or in an occupation necessary to such production* * * * [152 F. 2d at 476].[9] [Emphasis added.]

This ruling was relied upon and reaffirmed by the Seventh Circuit in the *Blue Star* case, *supra*, which also involved warehouses serving a chain of retail stores located in Illinois and Indiana. In sustaining "production" coverage of employees performing virtually identical functions to those here involved, the court said (164 F. 2d at 330–331):

> * * * employees engaged in unloading and checking goods shipped in interstate commerce, and in handling them on the platforms, as well as those engaged in shipping such goods from warehouses in Illinois to stores in another state, *are all engaged in the production of goods for commerce or in an occupation necessary to such production, Walling* v. *Goldblatt Bros.*, 7 Cir., 152 F. 2d 475, 476. [Emphasis added.]

Similarly, in the *Montgomery Ward* case, 150 F. 2d 369, vacated as moot, 326 U. S. 690, the Seventh Circuit broadly construed the term "production" as including the functions performed by

[9] It has been stipulated by the parties in this action that the functions of the various Goldblatt departments and the general duties of the Goldblatt employees have remained the same continuously from 1938 to date (R. 58).

a retail department store and mail order business. The question there was whether the President's seizure powers in the War Labor Disputes Act extended to such a business, and decision turned upon the meaning of the word "production" as used in that Act. Even though the War Labor Disputes Act did not contain the broad definition of the Fair Labor Standards Act, the Seventh Circuit, nevertheless, adopted the Fair Labor Standards Act's definition as construed in *Western Union* v. *Lenroot,* 323 U. S. 490, *supra.*

It is, therefore, difficult to understand how the Seventh Circuit reached the conclusion it did in this case. As it observed, "From a consideration of the processes occurring in the warehouses it is inescapable that there is physical touching by Goldblatt's employees of the goods in the warehouses which are intended for movement in interstate commerce" (R. 128). The "physical touching" or handling occurs in connection with the numerous tasks that must be performed to prepare the goods for shipment from the warehouses to Goldblatt's various stores (including its three Indiana stores), such as removing the goods from stock, placing them in bins, checking them, packing them in containers (Fdgs. 7, 17, 29, 33; R. 102, 106, 110, 112), and in some cases splitting up large packages of goods into smaller ones (R. 129). Plainly, these acts of "handling" are acts of "production" under the holding in the *Western Union* decision that the term includes the pack-

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aging of goods and all other "tasks incidental to preparing for shipment" (323 U. S. at 503). For, as the Seventh Circuit itself has said, "what definition of the word 'production' could otherwise be given when it is used in addition to the word 'manufacture'?" *United States* v. *Montgomery Ward*, 150 F. 2d at 379.

Thus the Seventh Circuit's reliance on the *Western Union* decision as supporting its narrow construction of "production" in the instant case (R. 129) seems baseless. The only exception which the *Western Union* decision made to the inclusion of all "handling" within the scope of "production" was "the handling or working on which accomplishes the interstate transit or movement in commerce itself", such as that carried on by a "common carrier" like telegraph companies and railroads (323 U. S. at 503–504). The context of this exception clearly indicates that it is limited to "handling in carriage or transmission in commerce" when done by a "common carrier * * * in the regular course of its business of [transporting] * * * *goods not produced by such common carrier*" (*id.* at 504). [Emphasis added.] That exception is obviously not applicable here. Goldblatt is not a common carrier; it is a chain-store organization engaged in the handling and distribution of its own goods.

2. As respondent seems to concede (Br. in Opp., pp. 3, 10, 11, 12), the authorities sustaining cover-

age for guards and clerical employees on "production" grounds were not modified by the 1949 Amendments (c. 736, 63 Stat. 910) to the Act. On the contrary, they were explicitly approved. Thus, the Statement of the Majority of the Senate Conferees, after pointing out that amended Section 3 (j)[10] "adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage" (95 Cong. Rec. 14874), states (at p. 14875) that it continues to cover:

> Plant guards, watchmen, and other employees performing protective or custodial services for producer[s] of goods. *Walton* v. *Southern Package Corp.* (320 U. S. 540); *Wantock* v. *Armour & Co.* (323 U. S. 126); *Walling* v. *Sondock,* (132 F. 2d 77 (C. A. 5)); *Engebretson* v. *Albrecht* (150 F. 2d 602 (C. A. 7)); *Slover* v. *Wathen* (140 F. 2d 258 (C. A. 4)); *Shepler* v. *Crucible Steel Co.* (140 F. 2d 371 (C. A. 3)); *Walling* v. *Thompson* (65 F. Supp. 686 (D. C. Calif.)).

[10] Section 3 (j) presently provides, "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof,* in any State." The italicized phrase was substituted by the amendment for the previous language "or in any process or occupation necessary to the production thereof."

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> The work of such employees is, as a rule, closely related and directly essential to production *whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer.* [Emphasis added.]

It will be noted that the Statement of the Senate Conferees specifically approved, in addition to this Court's decisions in *Walton* v. *Southern Package Corp.*, 320 U. S. 540, and *Wantock* v. *Armour & Co.*, 323 U. S. 126, the Fifth Circuit's decision in *Walling* v. *Sondock*, 132 F. 2d 77, certiorari denied, 318 U. S. 772. The latter case, like the instant case, concerned employees of an independent watchman agency. See *supra*, pp. 25–26.

The Statement of the House Managers confirms that of the Senate Conferees. It states that employees engaged in "maintenance, custodial, and clerical work will remain subject to the act, *notwithstanding they are employed by an independent employer* performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce" (95 Cong. Rec. 14929). [Emphasis added.]

The decisions subsequent to the adoption of the 1949 Amendments, involving guards or watch-

men, have uniformly held them within the coverage of the amended Act. *General Electric Co.* v. *Porter,* 208 F. 2d 805, 811 (C. A. 9), certiorari denied, 347 U. S. 951; *Russell Co.* v. *McComb,* 187 F. 2d 574 (C. A. 5); *Union Nat. Bank of Little Rock* v. *Durkin,* 207 F. 2d 848 (C. A. 8); *Messenger* v. *Traders Compress Co.,* 107 F. Supp. 354 (E. D. Okla.), reversed on other grounds, 199 F. 2d 8 (C. A. 10), certiorari denied, 344 U. S. 909; *Mitchell* v. *Famous Realty,* 211 F. 2d 198 (C. A. 2), certiorari denied, No. 141, this Term, October 14, 1954; *Tobin* v. *Promersberger,* 104 F. Supp. 314 (D. Minn.); *Broach* v. *McPherson,* 220 Ark. 457, 248 S. W. 2d 355, reaffirmed, 257 S. W. 2d 565; *Tobin* v. *Hayes,* 11 WH Cases 140, 22 Labor Cases, Para. 67,208 (S. D. Fla.). The same result has been reached with respect to clerical employees under circumstances similar to those present here. *Mitchell* v. *Mercer Water Co.,* 208 F. 2d 900 (C. A. 3), affirming 112 F. Supp. 656 (W. D. Pa.).

C. A SWITCHBOARD OPERATOR REGULARLY ENGAGED IN MAKING INTERSTATE TELEPHONE CALLS IS ENGAGED "IN COMMERCE" WITHIN THE MEANING OF THE ACT

The Act's definition of "commerce" is not limited to "trade" but in plain terms also includes "transportation, transmission, or *communication*" (Section 3 (b) (*supra,* p. 2)). [Emphasis added.] The court below, however, held the Act inapplicable to respondent's switchboard

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operator, whose duties regularly involved the making and receiving of interstate telephone calls to and from respondent's Goldblatt guards (R. 132), on the ground that "communication" must be between employees of different employers in order for it to constitute "commerce." This holding obviously rests on the assumption that the Act applies only to commercial transactions or "trade." The court reasoned that "it takes two to make a trade," and "these two must be the employer and another person or firm with which he is dealing" (R. 132).[11] Not only does this assumption ignore the Act's definition of "commerce," but it is contrary to this Court's decision in *Powell* v. *U. S. Cartridge Co.*, 339 U. S. 497, as well as to a consistent line of decisions of several courts of appeals. *Bodden* v. *McCormick Shipping Corp.*, 188 F. 2d 773 (C. A. 5); *Fox* v. *Summit King Mines*, 143 F. 2d 926 (C. A. 9); *Darr* v. *Mutual Life Insurance Co.*, 169 F. 2d 262 (C. A. 2), certiorari denied, 335 U. S. 871; *Bell* v. *Porter*, 159 F. 2d 117, 119 (C. A. 7), certiorari denied, 330 U. S. 813.

[11] It may be noted that the court below was also in error in assuming that the interstate communication was limited to communications between respondent's own employees. While this type of communication is described specifically and in detail in the district court's findings, there is also a more general, and unchallenged, finding that "employees in [respondent's] central office also make calls to and receive calls from points in States other than Illinois and Indiana, depending on the circumstances of the business" (Fdg. 39, R. 115).

In the *Powell* case, this Court specifically repudiated virtually the same construction of "transportation" as the Seventh Circuit has now adopted with respect to "communication." It was urged in *Powell* that, since the munitions were produced solely for the Government's use in the national defense and came into the Government's possession before their subsequent interstate shipment, the interstate transportation was not commerce because it was not for any trade or commercial purpose. The Court, however, found "no merit in an interpretation of the Act which would exclude from its coverage those employees who were engaged in the production of munitions for interstate transportation for use or consumption, as distinguished from transportation of them for sale or exchange" (339 U. S. at 512).

The Seventh Circuit itself, even prior to the *Powell* decision, made the same ruling in a similar case, stating flatly that "interstate commerce is not limited to interstate trade." *Bell* v. *Porter, supra,* 159 F. 2d at 119; see also the Seventh Circuit's recent reaffirmation of this ruling in *Mitchell* v. *Pilgrim Holiness Church Corporation,* 210 F. 2d 879, certiorari denied, 347 U. S. 1013.

Other courts of appeals have also rejected the concept that "commerce" must be "trade" to be covered by the Act. In reversing a lower court which denied coverage because the rebuilding and selling of a single surplus yacht was not part of a trade or business, the Fifth Circuit, in *Bodden*

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v. *McCormick Shipping Corp.*, 188 F. 2d 773, citing the *Powell* case, held, "whether or not, therefore, the transportation of goods is 'commerce' within the definition of the Act, does not depend upon whether such transportation is in connection with a trade or business." Prior to the decision in the *Powell* case, the Ninth Circuit also had so ruled in *Fox* v. *Summit King Mines*, 143 F. 2d 926, when it held that gold bullion produced in one State and mailed to a United States mint in another State constituted "production of goods for commerce" under this Act, citing *inter alia International Textbook Co.* v. *Pigg*, 217 U. S. 91; and *Caminetti* v. *United States*, 242 U. S. 470, and concluding that "it is well settled that transmission through the mails is interstate commerce * * * and that it is immaterial whether or not the transportation is commercial in character" (143 F. 2d at 926). In *Darr* v. *Mutual Life Insurance Co.*, 169 F. 2d 262, *supra*, the Second Circuit held that insurance policies were goods produced for commerce even though the transportation occurred between the home office and the branch office.[12]

[12] The only other decision precisely on this point is a district court decision which also reached the opposite result from that of the Seventh Circuit in the instant case. In *Walling* v. *Paramount-Richards Theatres*, 61 F. Supp. 290 (E. D. La.), the court held that telephone operators who received and transmitted long distance calls to and from out-of-state theaters owned by their employer were engaged in commerce.

The narrow ruling on interstate communication in the instant case is also inconsistent with this Court's decisions in *North American Co.* v. *S. E. C.*, 327 U. S. 686 (where it was held that a holding company's use of the "mails and facilities of interstate commerce" in order to "maintain its other relationships and contacts with its own subsidiaries" constituted commerce (327 U. S. at 694–695)); and *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128, in which the Court ruled that "interstate communication of a business nature, whatever the means of such communication, is interstate commerce * * * ."

CONCLUSION

The decision of the court of appeals should be reversed, insofar as it reversed the judgment of the district court, and the judgment of the district court should be reinstated.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 230

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

JOYCE AGENCY, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The respondent, Joyce Agency, Inc., respectfully requests that the petition for a writ of certiorari filed by the petitioner in this Court on July 21, 1954, be denied.

The petitioner, the Secretary of Labor, is attempting to establish in this case a new boundary of coverage under the Fair Labor Standards Act. In view of the overwhelming authority against him, which was recognized and applied by the Court of Appeals for the Seventh Circuit, the petition should be denied.

REASONS FOR DENYING THE WRIT.

This Court has observed that "to search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle" (*Kirschbaum* v. *Walling*, 316 U. S. 517); that "what is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation" (*Gully* v. *First National Bank*, 299 U. S. 109, 117); and that "remoteness of a particular occupation from the physical process [of production] is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act" (*10 East 40th Street Bldg., Inc.* v. *Callus*, 325 U. S. 579, 583).

Common-sense would seem to indicate that guarding a warehouse is a "predominantly local situation." However, since "the Fair Labor Standards Act puts upon the Courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations" (*Kirschbaum* v. *Walling*, 316 U. S. 517), resulting in hundreds of adjudicated cases, an analysis of the bulk of the cases which factually resemble this one may furnish a "dependable touchstone" which will buttress the common-sense reaction.

Certain it is that this Court has drawn a line of coverage somewhere between the guarding of a loft building where manufacturing is carried on (*Kirschbaum* v. *Walling*, 316 U. S. 517) and the guarding of a building in which 48% of the rented area is occupied by the executive offices of manufacturing companies and whose occupants are most assuredly engaged in commerce (*10 East 40th Street Bldg.*,

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Inc. v. *Callus*, 325 U. S. 579). The distinction should be fairly obvious since Congress in the enactment of the Fair Labor Standards Act defined "commerce" narrowly and "production" broadly: to be covered an employee must be *engaged* in commerce, not merely affecting it as in other statutes, whereas he needed originally only to be *necessary* to production and more recently *directly essential* to production to be covered. A guard or watchman who stands by and watches a scene of production may be necessary or directly essential to production but it takes something more than watching to cause him to be actually "engaged in commerce."

A close analysis of the Secretary's position in this case will reveal that he is contending here that all activity of any kind whatsoever except transportation is "production," thus conveniently disposing of what he apparently finds to be a somewhat bothersome and limiting concept of "engaging in commerce." Under this concept there is no longer any handling in the stream of commerce nor any local handling of goods: if any employee so much as touches goods he is engaged in its production for interstate commerce; if a watchman sees the handling, he is also producing. The result of such reasoning is to destroy entirely the heretofore unchallenged Congressional intent to make the Fair Labor Standards Act cover less area than constitutionally possible and to convert the Act into one which undoubtedly would cover more area than constitutionally possible. In *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, 503, 65 S. Ct. 335, 342, this Court stated:

> "The Government contends that in defining 'produced' the statute intends 'handled' or 'worked on' to mean not only handling or working on in relation to producing or making an article ready to enter interstate transit, but also includes the handling or working on which accomplishes the interstate transit or move-

> ment in commerce itself. If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a 'producer' of any goods he carries * * * If we * * * assume that handling for transit purposes is handling in production, we encounter results which we think Congress could not have intended."

As will subsequently be shown, handling for warehouse purposes is not handling in production either.

The Secretary is attempting to reason as follows:

> (1) Guards have been held in some cases to be covered;
>
> (2) The performance of warehouse functions has been held in some cases to be covered;
>
> (3) Therefore, the guarding of warehouse functions is an activity covered by the Fair Labor Standards Act.

Actually, the cases are remarkably uniform in holding contrary to the Secretary's position in this way:

> (1) Guards and watchmen are covered by the Act only when their duties are performed in connection with the operation of an enterprise producing goods for commerce and they are not covered when such duties are performed in connection solely with an enterprise engaging in commerce;
>
> (2) The function of warehousing may constitute engaging in commerce but does not constitute the production of goods for commerce; the storage of goods and the carriage or transportation of goods are commerce but are not production;
>
> (3) Therefore, guards and watchmen performing their duties in connection with the operation of a warehouse are clearly and decidedly not covered by the Fair Labor Standards Act.

A glance at the following table of "watchmen cases" indicates the uniformity of court decisions in this field and reveals how the decision of the Court of Appeals for the Seventh Circuit fits into the pattern of cases:

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Case	Citation	Jurisdiction and Year	Employee Not Covered by FLSA	Engaged in Commerce Only	Employee Covered by FLSA	In Production of Goods for Commerce	Facts
10 E. 40th St. Bldg. Inc. v. Callus	325 U. S. 578	U. S. Sup. Ct. 1945	x	x			Watchman of building in which 48% of rented area occupied by executive offices of manufacturing companies
Walton v. Southern Package Corp.	320 U. S. 540	U. S. Sup. Ct. 1944			x	x	Night watchman for veneer manufacturing plant
Russell Co., Inc. v. McComb	187 F. 2d 524	5th Circ. 1951			x	x	Guarded area where coffee and rice were packaged
Parham v. Austin Co.	158 F. 2d 566	5th Circ. 1946	x	x			Guarded plant construction
Wilson v. R. F. C.	158 F. 2d 564	5th Circ. 1946	x			x	Guarded housing of employees of manufacturing plant
Phillips v. Graham Aviation Co.	157 F. 2d 443	5th Circ. 1946	x	x			Guarded air field
Carrigan v. Provident Trust Co.	153 F. 2d 74	3rd Circ. 1946	x	x			Guarded bank
Engebretsen v. E. J. Albrecht Co.	150 F. 2d 602	7th Circ. 1945			x	x	Guarded area where materials required for building dams, etc., were repaired
Building Service Employees International Union v. Trenton Trust Co.	142 F. 2d 257	3rd Circ. 1944	x	x			Guarded trust company
Blumenthal v. Girard Trust Co.	141 F. 2d 849	3rd Circ. 1944	x	x			Caretaker of apartment building
Slover v. Wathen	140 F. 2d 258	4th Circ. 1944			x	x	Watchman at pier where barges were repaired
Noonan v. Fruco Construction Co.	140 F. 2d 633	8th Circ. 1943	x	x			Guarded construction of building for manufacture of munitions
Convey v. Omaha National Bank	140 F. 2d 650	8th Circ. 1943	x	x			Guarded bank building
Lofther v. First National Bank	138 F. 2d 299	7th Circ. 1943	x	x			Guarded bank building
Waller v. Humphreys	133 F. 2d 193	5th Circ. 1943	x	x			Guarded sea food plant when not in operation
Walling v. Sondock	132 F. 2d 77	5th Circ. 1942			x	x	Independent agency guarding producers

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Case	Citation	Jurisdiction and Year	Employee Not Covered by FLSA	Employer Engaged in Commerce Only	Employee Covered by FLSA	Employer Engaged in Production of Goods for Commerce	Facts
Johnson v. Dallas Downtown Dev. Co.	132 F. 2d 287	5th Circ. 1942	x	x			Guarded insurance company building
Mid-Continent Pipe Line Co. v. Hargrave	129 F. 2d 655	10th Circ. 1942			x	x	Guarded pipe line
Messenger v. T. C. Co.	107 F. S. 354	Okla. 1951			x	x	Guarded cotton compressing operations
Haynie v. Hogue Lumber & Supply Co.	96 F. S. 215	Miss. 1951	x	x			Guarded lumber yard
Craig v. Heide & Co.	94 F. S. 442	N. C. 1951			x	x	Guarded repair of vessels
Moehl v. DuPont & Co.	84 F. S. 427	Ill. 1947			x	x	Guarded ordnance plant
Bauler v. Pressed Steel Car Co.	81 F. S. 172	Ill. 1948			x	x	Guarded production of military goods
Campbell v. Jones & Laughlin Steel Co.	70 F. S. 906	Penn. 1947			x	x	Guarded steel plant
Lewis v. Florida Light & Power Co.	69 F. S. 23	Fla. 1946			x	x	Guarded electric generating plant
Walling v. West Kentucky Coal Co.	60 F. S. 681	Tenn. 1944			x	x	Guarded coal mine
Cushway v. Stork Engineering Co.	51 F. S. 568	Mich. 1943			x	x	Guarded factory
Hinkler v. 83 Maiden Lane	50 F. S. 263	N. Y. 1943	x	x			Guarded building housing insurance company
Reliance Co. v. Hubbard Storage & Inspection Co.	50 F. S. 1012	Va. 1943			x	x	Guarded raw tobacco prior to manufacture
Timberlake v. Day & Zimmerman, Inc.	49 F. S. 28	Iowa 1943			x	x	Guarded ordnance plant
Fleming v. Stillman	48 F. S. 600	Tenn. 1943			x	x	Guarded automobile reclamation plant
Bartholome v. Baltimore Fire Patrol Co.	48 F. S. 98	Md. 1942	x	x			Independent detective agency guarding various types of

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The courts have been careful to limit the applicability of the Act to guards and watchmen to those whose duties are performed at an establishment which produces goods for commerce. In short, guards and watchmen are brought within the Act by the "production" rather than the "commerce" provisions of the Act. In the absence of activities constituting production for commerce, guards and watchmen are outside the Act.

In *Engebretsen* v. *E. J. Albrecht Co.*, 150 F. (2d) 602 (C. C. A. 7th, 1945), the Court said at page 604:

> "It has been held that an employee who acts as a guard is engaged in the production of goods in commerce, if the employer is so engaged." [Citing cases.]
>
> "In reaching our conclusion we must look to the employee's activity rather than the employer's activity, so far as 'engaged in commerce' determines liability * * * However, where the employer is engaged in the production of goods for commerce, we need look only to see if the employee's work is essential thereto.
>
> "That he [a watchman] was an employee is not in dispute. That the character of his employment, namely, that of a guard, brought him within the language of the statute, we think clear, *provided the company was engaged in the production of goods for commerce.*" (Emphasis in Court's opinion.)

In *Carrigan* v. *Provident Trust Co.*, 153 F. (2d) 74 (C. C. A. 3rd, 1946), the Court held that a guard employed by a bank which admittedly was engaged in interstate commerce but did not produce goods, was not subject to the Act. The Court said at page 75:

> "An important distinction between the two definitions is evident. Congress described 'production' to include acts merely necessary to the production of goods. 'Commerce' on the other hand, is so closely circumscribed that acts merely necessary to commerce are not included. The wide variation in the scope of the two terms has frequently noted.

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"The employees concerned in [*A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517] * * * serviced buildings occupied by tenants principally engaged in the production of goods for interstate commerce. In sharp contrast the Court in *McLeod* v. *Threlkeld*, 319 U. S. 491, held a cook for maintenance-of-way employees of an interstate railroad not 'engaged in commerce' and therefore not within the coverage of the Act.

"In the instant case it is admitted that appellee bank did not produce goods. Hence, appellant-employee was not 'engaged in the production of goods for commerce,' and cases involving such production are not authoritative herein and are confusing."

The Court further stated at page 76:

"But for a rather remote possibility that the law would be violated by a person or persons violently and forcefully breaking into the bank premises with the intent of robbery, or that some emergency should arise as a fire or leaky pipe, the watchman's services would have no effect upon commerce, and even then the effect of the watchman's acts would be negative and not acts in commerce. He had no hand whatever in the affirmative acts which constitute commerce. No act within the scope of the appellant's duty touches any facet of the acts of commerce in which the bank was engaged. The watchman's services were separate and distinct from any function of the bank which goes into the conception of interstate commerce."

In *Slover* v. *Wathen*, 140 F. 2d 258 (C. C. A. 4th, 1944), the watchman held to be subject to the Act was clearly engaged in the production of goods and the Court said at page 260:

"Innumerable other cases also hold that *watchmen who are employed* to guard and protect property *for employers engaged in the production of goods for commerce come within the provisions of the Act.*" (Italics added.)

In *Russell Co.* v. *McComb*, 187 F. (2d) 524 (C. A. 5th,

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1951), the Court said that "the night watchman in question is employed to guard appellant's premises, including the warehouse building, offices, the area inside in which the *coffee and rice are packaged* for distribution * * * (page 525, italics added). The Court found that the watchman was engaged in the production of goods for commerce.

On the other hand the same Court of Appeals and the same Circuit Judge (McCord) in *Phillips* v. *Graham Aviation Co.*, 157 F. (2d) 443 (C. C. A. 5th, 1946), stated as follows at pages 443-4:

> "* * * appellants were employed as guards and watchmen by the Graham Aviation Company * * * in Georgia. Their duties and responsibilities were the usual ones of guards and watchmen to protect and safeguard persons and property on the premises of the employer.
>
> "Under contract with the United States Government, Graham Aviation Company was engaged in the training of student fliers for service in the air forces of the nation. Students from various parts of the United States were assigned to the field by military authorities. It is alleged that airplanes engaged in government service were frequently serviced and repaired at the field; that a canteen which sold goods that had been procured from the channels of interstate commerce, was operated for the benefit of students; and that planes from the field frequently crossed state lines—some going to Pennsylvania where appellee maintained another training field.
>
> "There is no issue as the 'production of goods for commerce,' and appellants must stand or fall on the issue of whether they are 'engaged in commerce.' It is unnecessary to discuss whether appellee's business of training student fliers for the government and operating a flying field for that purpose can be considered interstate commerce, for under the Fair Labor Standards Act and the many decisions it is clear that in such cases as this the work of the particular employee is decisive. * * * The work of these appellants was purely

> local in character; a mere guarding of the local airfield and the personnel and property thereon. On the facts of this case, a holding that such activity is 'interstate commerce' would be stretching coverage beyond the breaking point to include a situation far beyond the pale of the act."

In *Walling* v. *Sondock*, 132 F.(2d) 77 (C. C. A. 5th, 1942), the Court said at page 78:

> "Appellees operate an agency engaged in the business of furnishing guards or watchmen to various customers in and about Houston, Texas. * * * Upon these principles, *those watchmen charged with the protection and preservation of the buildings and machinery used to produce goods for commerce* perform duties having an essential relationship to the process of producing and distributing goods in interstate commerce."

The 1949 amendment of the definition of "produced" has not changed, but has instead strengthened, the concept that guards and watchmen are covered only when their work is closely related or directly essential to production for commerce.

Section 3 j of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. § 203) provides:

> " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, * * *."

Originallly, the following phrase concluded the definition:

> "or in any process or occupation necessary to the production thereof, in any State."

The 1949 amendment substituted for that phrase this one (63 Stat. 910):

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"or in any closely related process or occupation directly essential to the production thereof, in any State."

In the Conference Report upon the Fair Labor Standards Amendments of 1949, H. R. 1453, 81st Cong., 1st Sess., the House Managers reported at page 14:

"Coverage under the act for a large category of employees is determined by the definition of the term 'produced.' The definition is divided into two parts. The first part, which the conference bill leaves unchanged, covers any employee 'producing, manufacturing, mining, handling, transporting, or in any other manner working on * * * goods.' Thus the first part covers employees engaged in actual production activities *as opposed, for example, to employees engaged in maintenance, clerical, or custodial work.*" (Emphasis added.)

It is clear that the employees in this case are not covered by the first part of the definition. The Report continues:

"The second part of the present definition, covering any employee engaged in '*any* process or occupation *necessary* to the production' of goods, has been interpreted by the Administrator and the courts to cover employees of many local merchants, because some of the customers of such merchants are producing goods for interstate commerce. * * *

"Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above-cited cases. On the other hand, the proposed changes are not intended to remove from the act maintenance, custodial, and clerical employees *of manufacturers, mining companies, and other producers of goods for commerce.*" (Emphasis added.)

In the Statement of a majority of the Senate Conferees on the Fair Labor Standards Amendments of 1949, Cong.

Rec., 81st Cong., 1st Sess., pp. 15368-15377 (Oct. 19, 1949), the following appears:

> "Typical of the classes of employees whose work is closely related and directly essential to production, within the meaning of section 3(j) as amended by the conference agreement, are the following employees performing tasks necessary to effective productive operations of the producers: * * *
>
> "3. Plant guards, watchmen, and other employees performing protective or custodial services *for producers of goods.*" (Emphasis added.)

In the Statement of the Chairman of the House Committee on Education and Labor, on the House Conference Report, Cong. Rec., 81st Cong., 1st Sess., pp. 15135-15136 (Oct. 18, 1949), the following appears:

> "Employees engaged in activities which are several degrees or stages removed from the production of goods for commerce cannot be said to be engaged in a process or occupation closely related thereto."

These statements evince a clear understanding on the part of members of Congress that guards of plants producing for commerce are to be distinguished from guards of enterprises engaging in commerce. The distinction drawn by Congress must control the judicial interpretation of the coverage afforded by the Fair Labor Standards Act.

It is also clear that the courts have recognized that the warehousing function may constitute commerce but does not constitute production for commerce. In *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 63 S. Ct. 332 (1943), the Supreme Court said at page 568 (335):

> "There is no indication (apart from the exemptions contained in § 13) that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing

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goods in a warehouse can be allowed to defeat that purpose. The entry of goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. As in the case of an agency (*cf. De Loach* v. *Crowley's Inc.*, 5 Cir. 128 F. 2d 378) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce."

In *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, 65 S. Ct. 807 (1945), the Supreme Court said at page 810:

> "Here petitioner's warehouse and central office employees are performing wholesale duties in the very midst of the stream of interstate commerce. They constantly deal with both incoming and outgoing interstate shipments."

In *Donovan* v. *Shell Oil Co., Inc.*, 168 F. (2d) 229 (C. C. A. 4th, 1948), the company had "no refinery in the State of Maryland, but it does maintain a bulk depot plant at Wagners' Point, Maryland." The Court held that "it is not and could not be disputed that the portion of the defendant's business with which we are here concerned, *i. e.*, the transportation of petroleum products into the State of Maryland from without the state, and *the subsequent distribution to points within and without Maryland, was commerce.*" Therefore the employer "was so closely related to the stream of commerce as to form a part of it" (page 231; emphasis added).

In *Walling* v. *American Stores Co.*, 133 F. (2d) 840 (C. C. A. 3rd, 1943), the Court held at page 846:

"We think the conclusion from these facts is clear that there is in this case a practical continuity of movement of the goods until they reach the defendant's retail stores. The maintenance of the warehouse * * * is not to break that continuity but to make it even, economical and uninterrupted. The conclusion, therefore, is that all of the defendant's warehouse employees are engaged in commerce within the meaning of the Act."

In *Marchant* v. *Sands Taylor & Wood Co.*, 75 F. Supp. 783 (D. Mass., 1948), the Court held (at pages 784-785):

"[The defendant employer, a wholesaler in flour, coffee and tea] had warehouses in Somerville, Massachusetts (where the plaintiff was employed), Worcester, Massachusetts, and Providence, Rhode Island, as well as regular jobbers in New Hampshire. The plaintiff regularly shipped merchandise from the warehouse at Somerville for delivery to the warehouse in Providence, and to jobbers in other states. *The plaintiff was engaged in commerce within the meaning of the Act.* His work involved the interstate delivery of defendant's merchandise." (Emphasis added.)

At pages 786 and 787, the Court describes in some detail the character of the employee's activities:

"He made up loading lists for the trucks * * * He watched the inventory of flour * * * When a customer came to the warehouse for supplies, plaintiff rang a bell and summoned warehousemen to help the customer * * * When freight cars arrived, he summoned warehousemen to unload them. He collected the time-cards of other workers * * * He opened the warehouse in the morning and closed it at night * * * Plaintiff fired the coal stoker, parked trucks, ground coffee beans, and did other manual tasks regularly."

In *McComb* v. *Blue Star Auto Stores, Inc.*, 164 F. (2d) 329 (C. C. A. 7th, 1948), the Court held (at page 331):

"*Under the circumstances here appearing* it is now well settled that *warehouse* and central office employees

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> who work either at selling or delivering across State lines, or at buying and receiving across State lines, *are employed in commerce* whether they write letters, keep books, or load or unload or drive the trucks * * * [citing cases]." (Emphasis added.)

As dictum the Court stated (at page 339):

> "All employees engaged in procuring goods from other states for transportation to and delivery at employer's warehouses are engaged in 'commerce' within the meaning of the Act; likewise, employees engaged in unloading and checking goods shipped in interstate commerce, and in handling them on the platforms, as well as those engaged in shipping such goods from warehouses in Illinois to stores in another state are all engaged in the production of goods for commerce or in an occupation necessary to such production. *Walling* v. *Goldblatt Bros.*, 7 Cir., 152 F. 2d 475, 476."

In 152 F. 2d 475, the Court had held simply that the retail exemption did not apply to certain Goldblatt operations, and in *Walling* v. *Goldblatt Bros., Inc.*, 128 F. (2d) 778 (C. C. A. 7th, 1942), this Court held in connection with activities at Goldblatt warehouses that:

> "*Persons engaged in shipping goods to the Indiana stores are engaged in interstate commerce.*" (Emphasis added.)

The Court did not hold in any of the Goldblatt decisions that employees performing a warehousing function (whether in connection with the receipt of goods into the warehouse, storage, or shipping out of the warehouse) were engaged in any activity other than commerce. It was held merely that certain employees involved in the manufacture or processing of goods were engaged in production for commerce. The warehouses guarded by respondent's employees are the scenes of activities undertaken by Goldblatt employees which are largely local or intrastate in character, are to a minor part of an interstate nature,

and are in no measure "production" within the meaning of the Fair Labor Standards Act.

The inevitable conclusion reached is supported by several self-evident propositions. First, where the establishment guarded is not the scene of production, it is superfluous to note that the guards are not engaged in production activities. Second, despite the fact that the establishment guarded is the scene of interstate commerce, a guard's connection with that commerce is less than substantial and has not been considered sufficient enough to warrant the conclusion that he too is engaged in commerce. See: *Phillips* v. *Graham Aviation Co.*, 157 F. (2d) 433 (C. C. A. 5th, 1946); *Carrigan* v. *Provident Trust Co.*, 153 F. (2d) 74 (C. C. A. 3rd, 1946). Third, unless a guard be considered engaged in commerce or the production of goods for commerce, he cannot be held to be within the Act.

The decision and opinion of the Court of Appeals for the Seventh Circuit conform to the law uniformly laid down everywhere and therefore it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 230

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

JOYCE AGENCY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR JOYCE AGENCY, INC.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR JOYCE AGENCY, INC.

OPINIONS BELOW.

The opinion of the District Court (R. 92-100) is reported at 110 F. Supp. 918, and the "Findings of Fact and Conclusions of Law" appear in the record at pages 100 to 118. The opinion of the Court of Appeals (R. 125-133) is reported at 211 F. 2d 241.

JURISDICTION.

The judgment of the Court of Appeals (R. 133) was entered on March 29, 1954, and petitioner's petition for rehearing was denied on April 23, 1954 (R. 135). Certiorari was granted on October 14, 1954 (R. 137). The jurisdiction of this Court rests on 28 U. S. 1254 (1).

QUESTION PRESENTED.

Whether guards and watchmen, and related clerical workers, employed to furnish theft and fire protection to the warehouses of a retail department store organization, where merchandise from out-of-State sources is received, unloaded, and to some extent shipped out of the State, are engaged "in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended.

STATUTE INVOLVED.

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of October 26, 1949, c. 736, 63 Stat. 910; 29 U. S. C. 201 *et seq.*, are:

Definitions:

Section 3 (63 Stat. 911): As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication, among the several States or between any State and any place outside thereof.

* * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * *

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Maximum Hours:

Section 7 (63 Stat. 912):

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

• • • • •

SUMMARY OF ARGUMENT.

Respondent's guards and related clerical workers furnishing theft and fire protection to the warehouses of a retail department-store organization are engaged in purely local activities and are not engaged "in commerce or in the production of goods for commerce."

A. Administrative interpretation and the Federal courts have already held that the very warehouses in this case are the scenes of activities primarily local in nature, to some extent constitute commerce, but to no extent may be deemed production for commerce, and that persons guarding such warehouses where no manufacturing is carried on are not covered by the Fair Labor Standards Act.

B. Respondent's employees are not engaged "in commerce."

C. Respondent's employees are not engaged "in the production of goods for commerce."

1. Guards and watchmen are covered by the Act only when their duties are performed in connection with the operation of an enterprise producing goods for commerce and they are not covered when such duties are performed solely in connection with an enterprise engaging in commerce.

2. The function of warehousing may constitute engaging in commerce but does not constitute the production of goods for commerce; the storage of goods and the carriage or transportation of goods are commerce but are not production.

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ARGUMENT.

RESPONDENT'S GUARDS AND RELATED CLERICAL WORKERS FURNISHING THEFT AND FIRE PROTECTION TO THE WAREHOUSES OF A RETAIL DEPARTMENT-STORE ORGANIZATION ARE ENGAGED IN PURELY LOCAL ACTIVITIES AND ARE NOT ENGAGED "IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE."

Much of the Secretary of Labor's Brief in this case is phrased in such a way that, while it would be applicable and pertinent if the question here were the coverage under the Fair Labor Standards Act of employees participating in the stream of interstate commerce flowing through a warehouse, nevertheless it is completely beside the point in answer to the question actually presented as to the coverage of persons *watching* the activities in a warehouse. In fact the persons which the Secretary is attempting to bring under the Act in this case merely *watch* activities which themselves are primarily local in nature but to some extent constitute interstate commerce of a retailer, most of whose employees are exempt from the Act under the retail exemption. The step envisaged by this case goes much too far. As this Court has said:

> "Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act." *10 East 40th Street Bldg., Inc.* v. *Callus,* 325 U. S. 579, 583 (1945).

A. Administrative Interpretation and the Federal Courts Have Already Held That the Very Warehouses in This Case Are the Scenes of Activities Primarily Local in Nature, to Some Extent Constitute Commerce, But to No Extent May Be Deemed Production for Commerce, and That Persons Guarding Such Warehouses Where No Manufacturing Is Carried on Are Not Covered by the Fair Labor Standards Act.

The question raised in this case is by no means novel either to the Secretary of Labor (or his predecessor, the Wage and Hour Administrator) or to the Federal Courts. When the complaint herein was first filed in the Federal District Court on October 13, 1949 (R. 2), it marked a complete reversal of eight prior years of continuous administrative interpretation, involving the same employment and the same warehouses, exactly contrary to what is contended for here by the Secretary of Labor. The question involved here had also during that eight-year period been adjudicated adversely to the Secretary's present position by the District Court, the Court of Appeals and this Court (to the extent that denials of certiorari fit into a pattern established by this Court in other decided cases) in cases involving the same employment and the same warehouses, as well as in all other cases concerning similar situations.

The Wage and Hour Administrator (who was then administering the Fair Labor Standards Act, which is now enforced by the Secretary of Labor) first concerned himself with the warehouse operations of Goldblatt Bros., Inc. (hereinafter sometimes called "Goldblatt"), on April 16, 1940, when he filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to enjoin Goldblatt from violating Sections 15(a)(1) and 15(a)(2) of the Fair Labor Standards Act in respect to employees working at three warehouses

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located at 3932 South Wolcott Avenue, 3932 Wentworth Avenue and 1927 West Pershing Road, in Chicago, Illinois, where merchandise was shipped from forty-five states, title to such merchandise passing to Goldblatt upon delivery at the warehouses and the merchandise then being distributed to Goldblatt's retail stores, some of which stores were in Indiana. At the close of the Administrator's case, the District Court, on its own motion, held that "plaintiff has failed to prove that defendant's employees are engaged in commerce, or in the production of goods for commerce" for the reasons that the merchandise involved "had come to rest in defendant's warehouses" and that the shipments to Indiana when considered with Goldblatt's entire business, "comprise a continuous and integrated business and economic unit, local in character, such as naturally grow up adjacent to a great metropolitan center such as Chicago." *Fleming* v. *Goldblatt Bros., Inc.*, 39 F. Supp. 701 (N. D. Ill., 1941).

This decision was appealed and in *Walling* v. *Goldblatt Bros., Inc.*, 128 F. (2d) 778 (C. C. A. 7th, 1942), the Court of Appeals for the Seventh Circuit held that Goldblatt's employees "who unload wares at the warehouses are working on goods still in interstate commerce, and are therefore, subject to the Act," as also are "all employees engaged in checking such interstate goods prior to the time they have come to rest on the platform." However, the Court further held that "since upon delivery of the goods at defendant's warehouse, interstate movement has ceased, employees concerned solely with subsequent moving and storing of the goods in the warehouses are not in commerce" and "employees shipping goods from the warehouses to the Illinois stores are not within the Act." Furthermore, "*persons engaged in shipping goods to the Indiana stores are engaged in interstate commerce*" and "since the evidence indicates that all * * * [manufactur-

ing] employees manufacture goods without distinction as to whether they are to be sent to Indiana or to Illinois, all such manufacturing employees are within the Act.' The Court said:

> "We conclude that those employees who order and procure, those who unload goods from without the state, at defendant's warehouses; those who check them before they are deposited on the unloading platform, those who manufacture goods at the warehouses, *those engaged in maintaining, operating, caring for and servicing warehouses where production for commerce occurs,* and those who pack and ship goods to Indiana from the warehouses *are within the Act.* Those employees, however, who are concerned solely with storage in the warehouses and in delivery of goods to the Illinois stores and those printing and preparing record books, memoranda, and advertising copy are not subject to the Act." (All emphasis in this Brief has been supplied unless otherwise noted.)

The Court then stated that "what we have said shall not prejudice in any manner defendant's right to prove any of the statutory exemptions" and "we • • • remand the cause for such findings as ought to be made and such judgment as should be entered after the evidence has been heard."

This opinion was rendered on June 25, 1942. Petition for certiorari was filed in the United States Supreme Court by the Wage and Hour Administrator on September 25, 1942. On January 18, 1943, the Supreme Court of the United States announced its decisions in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572. Two weeks *after* the *Jacksonville* and *Higgins* cases—on February 1, 1943—this Court denied certiorari in the *Goldblatt* case, 318 U. S. 757. The total impact of these events—the *Jacksonville* and *Higgins* decisions and the subsequent denial of certiorari in the *Gold-*

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blatt case—gave a clear indication that insofar as the Supreme Court was concerned all was not simple black-and-white in the case of warehouse employees. Some were *not* covered by the Fair Labor Standards Act because they were engaged in purely local activities and others were covered because they were engaged in the stream of interstate commerce. None was held to be covered because they were engaged in production. The Wage and Hour Administrator, *after denial of certiorari* in the *Goldblatt* case, sought a rehearing of that case in the Court of Appeals for the Seventh Circuit on the ground that the *Jacksonville* decision required the Court of Appeals to change its decision in the *Goldblatt* case. The petition for rehearing was denied. Thus after every effort had been exhausted the opinion of the Court of Appeals was permitted to stand and it clearly held that

> "Persons engaged in shipping goods to the Indiana stores are engaged in interstate commerce."

Contrast this express holding with the District Court's opinion in the present case (which was reversed by the Court of Appeals):

> "The manifold activities of Goldblatt's employees in picking, handling, checking, packing and transporting goods destined for Goldblatt's stores or customers outside the State of Illinois constitute the 'production for commerce within the meaning of the Act'." (R. 96.)

The stipulated facts in the present case are that:

> "The duties of the defendant's employees and their relationship to the Goldblatt operations have remained substantially unchanged since 1938." (R. 58.)

The 1942 decision by the Court of Appeals in the *Goldblatt* case is important in another respect. At that time:

> "Some manufacturing operations are carried on in

some of the warehouses. There are processed bakery and food products, meat compounds, blankets, draperies, slipcovers, and other articles."

The court held that:

"Those engaged in maintaining, operating, caring for and servicing warehouses *where production for commerce occurs* * * * are within the Act."

At the time of the present case all manufacturing operations were completely separated from the warehouse operations and the watchmen at the manufacturing locations (Lexington Bakery, 2608 Lexington Street, and Martin Food Products, Inc., 3641 South Iron Street, Chicago) had been paid in accordance with the Fair Labor Standards Act for about five years (R. 50-52). In regard to this phase of the case, the District Court said:

"Since the defendant has complied with the Act in the case of its employees at the Lexington Bakery since May 2, 1949, and since it has no employees at the Martin Food Products since July 3, 1949, both prior to the filing of this action, the Court considers the question as to defendant's compliance in these two instances as moot. The employees at these establishments, therefore, are not the subject of this decision." (R. 93).

Upon remandment of the 1942 case in *Walling* v. *Goldblatt Bros., Inc.*, 56 F. Supp. 255 (N. D. Ill., July 11, 1944), the Court found that Goldblatt then operated fourteen department stores, one drug store, six warehouses and one bakery, including single stores in Hammond, Gary and South Bend, Indiana, Milwaukee, Wisconsin, and Buffalo, New York. The Judge then found "as a matter of law that defendant is operating a retail establishment within the meaning of Section 13(a)(2) and that all of its employees are employed in a local retailing capacity within the meaning of Section 13(a)(1) and are therefore not subject to the Act." [Relying upon *Allesandro* v. *C. F.*

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Smith Co., 136 F. (2d) 75 (C. C. A. 6th); *Walling* v. *L. Wieman Co.*, 138 F. (2d) 602 (C. C. A. 7th) cert. den., 321 U. S. 785; *Walling* v. *Block*, 139 F. (2d) 268 (C.C.A. 9th), cert. den. 321 U. S. 788.]

The second judgment of the District Court was reversed in *Walling* v. *Goldblatt Bros., Inc.*, 152 F. (2d) 475 (C. C. A. 7th, November 29, 1945), wherein the Court of Appeals based reversal upon the fact that the Supreme Court of the United States in *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, affirmed a decision of the Court of Appeals for the First Circuit, 144 F. (2d) 102, which was in conflict with the three decisions relied upon by the District Court. The Court said that "under this decision we feel impelled to hold that a majority of defendant's employees working in its central office, located in the State Street store, in the bakery, in the drapery workshop, located in the State Street warehouse, and in the five warehouses, not including the State Street warehouse, are engaged in wholesaling and manufacturing functions which are neither retail nor local, and that as to such employees, the exception under Section 13(a)(1) or 13(a)(2) in inoperative."[1] This de-

1. It should be noted that *all* other employees of Goldblatt were held to be governed by the retail exemption and hence not subject to the Fair Labor Standards Act. To this day it has never been contended that *any* employees in the Wabash warehouse are subject to the Fair Labor Standards Act.

The one fact in the legislative history of the Act which was emphasized repeatedly and unequivocally and with never a dissenting voice was that the business of local retail selling was not covered by the Act. The original bill (S. 2475, H. R. 7200) did not by its express terms exempt local retailers, but the then Assistant Attorney General (later Mr. Justice) Jackson explained in a memorandum that "the bill does not attempt to cover purely local pursuits or intrastate service trades" (Joint Hearings, p. 56) and testified that "it is not intended by this bill to affect the retail trades or the service trades" (Joint Hearings, pp. 39-40); "the policy of the bill is not to include the service trades * * * and the retailing enterprises * * * the bill does not affect the retail trades" (pp. 35-6).

The Senate Committee bill (S. Rep. No. 884, 75th Cong., 1st

cision related solely to the retail exemption and in no way related to the commerce holdings of the previous decision in 128 F. 2d 778. The cause was remanded for further proceedings.

Certiorari to the Supreme Court of the United States was denied in 328 U. S. 854, upon the petition of Goldblatt.

Sess.) exempted from coverage any person employed in a "local retailing capacity." In introducing the Senate bill, Senator (now Mr. Justice) Black, Chairman of the Senate Committee on Labor, stated that "we therefore eliminate in the beginning any idea that this is an effort to regulate wages and hours in the various service employments throughout the nation" because it was the "prevailing" if not "unanimous" sentiment of the Committee that "businesses of a purely local type which serve a particular local community, and which do not send their products into the streams of interstate commerce, can be better regulated by the laws of the communities and of the states in which the business units operate" (81 Cong. Rec. 7648).

The House Committee bill (H. Rep. No. 1452, 75th Cong., 1st Sess.) was substantially similar to the Senate Committee bill, but was later amended (H. Rep. No. 2182, 75th Cong., 3rd Sess.) to include employees of employers *"affecting commerce"* and *"purchasing goods in commerce."* The bill passed the House after an amendment to make clear the Congressional purpose to exclude local retailers was made from the floor and adopted (83 Cong. Rec. 7449) "to dissolve all doubt, dispel all chance of misinterpretation" and to make "clear beyond peradventure of a doubt that retailing is exempted" (p. 7438). Debate in the House included statements that "it is clearly understood" that the bill "absolutely exempts retailing" (83 Cong. Rec. 7281-2); that not even by the "wildest stretch of the imagination" and "regardless of any possible administrative interpretations" such businesses as the "local groceryman, druggist, clothing store, meat dealer—any merchant, in fact—laundry, hospital, hotel, or even transportation companies operating solely within a State" were "absolutely not" affected (p. 7299); that "retail establishments are absolutely out of the provisions of the bill" (p. 7308); that it had "been stated time and time again that local retailing is exempt from the bill" (pp. 7436-7).

The Act as finally passed by both houses eliminated all references to "affecting commerce" and "purchasing goods in commerce" and retained the express retail exemptions. The legislative history conclusively establishes the fact that the "retailing capacity" and "retailing establishment" exemptions of Section 13 (a)(1) and (2) would have effectively existed, even in the absence of their express inclusion, because of the indicated scope of coverage.

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Finally, in *McComb* v. *Goldblatt Bros., Inc.*, 166 F. (2d) 387 (C. C. A. 7th, 1948), the Court of Appeals affirmed the District Court's denial of an injunction on the ground that the defendant had by then fully complied with the Fair Labor Standards Act. The Court of Appeals in affirming the District Court said on March 3, 1948:

> "The [District] court found that *all employees of the company, for a long time past, had been compensated in accordance with the provisions of the Act;* • • • that plaintiff [Wage and Hour Administrator] did not dispute defendant's present compliance • • • "

The stipulated facts in the present case include the following (R. 58):

> "While from time to time (1) Goldblatt warehouse and bakery operations have been carried on in different buildings, (2) departments have been changed from one warehouse to another, and (3) departments have been added, eliminated, expanded or reduced, the general character and function of the various departments and the general duties of Goldblatt employees in the departments have remained substantially the same continuously from 1938 to the date hereof.
>
> "The duties of the defendant's employees and their relationship to the Goldblatt operations have remained substantially unchanged since 1938."

The relation of the Goldblatt warehouses and the persons employed in them to the Fair Labor Standards Act had been before the Federal District Court, the Court of Appeals and the Supreme Court continuously from 1940 to 1948 and yet in that eight-year period the Wage and Hour Administrator had never contended that the guards and watchmen of Goldblatt warehouses where no manufacturing was carried on were subject to the Act. The significance of this long adhered to administrative interpretation should not be overlooked. In *A. B. Kirschbaum*

Co. v. *Walling*, 316 U. S. 517 (1942), this Court made a pertinent observation:

> "The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the federal government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation."

Nor should the administrative agency entrusted with the enforcement of legislation forever seek to expand its meaning to include in today's interpretation what was never in yesterday's contemplation.

The Federal Courts in the *Goldblatt* cases did establish what in every sense except a technical one is and should be *res adjudicata* to the effect that some of the employees in the Goldblatt warehouses are *not* covered by the Fair Labor Standards Act because engaged in purely local activities and some are covered because engaged in interstate commerce but none is covered because engaged in production for commerce, and persons such as watchmen are covered only when they are protecting production and not when they watch a combination of local and interstate activity.

The administrative and judicial determination of these principles was not limited to the *Goldblatt* cases but has been entirely uniform.

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B. Respondent's Employees Are Not Engaged "in Commerce".

If it is recalled that the persons sought to be covered by the Fair Labor Standards Act here are not the persons participating in interstate commerce but rather those persons who guard premises which are to a minor extent involved in commerce, it is not difficult to conclude that such persons are, under the tests intended by Congress and established by this Court, not engaged "in commerce."

In *10 East 40th Street Bldg., Inc.* v. *Callus*, 325 U. S. 578 (1945), this Court, in holding that watchmen and maintenance employees of an office building housing various tenants engaged in commerce were not covered by the Fair Labor Standards Act when no manufacturing was carried on within the building, said at page 581:

> "The respondents are maintenance employees of the building, elevator starters and operators, window cleaners, *watchmen* and the like • • • *Obviously they are not 'engaged in commerce.'*"

There appears to be no question at all but that a substantial portion of the tenants in the 10 East 40th Street building were engaged in commerce. 20 concerns occupying 25.8% of the rented area "use their offices • • • for taking orders for substantial quantities of merchandise of substantial value produced and shipped from their factories and mines elsewhere located to customers in various states." Offices of sales agencies representing 17 concerns occupying 9.3% of the rented area take orders and "as a result of the efforts of these agencies, substantial amounts of merchandise of substantial value are shipped across state lines from factories, mines and warehouses, elsewhere located in various parts of the country." Advertising agents occupying 6.6% of the rented area "carry on publicity and advertising work using national publications,

newspapers and radio." Engineering and construction firms occupying 8.9% of the rented area have employees who "prepare plans and sketches in the building for construction projects located in various parts of the United States and in foreign countries." Investment organizations occupying 4.7% of the rented area do work "in connection with businesses and projects located in various parts of the country." Import and export company offices occupy 3.7% of the rented area, 51 F. Supp. 528 at 529-30 (S. D. N. Y., 1943).

Thus about 60% of the tenants of the 10 East 40th Street building were engaged in commerce, yet this Court found that "obviously they [watchmen] are not 'engaged in commerce.'" 325 U. S. 578 at 581. The Court of Appeals for the Second Circuit observed that the employees of the 10 East 40th Street building, "can not effectively contend that they are 'engaged in [interstate] commerce.' *McLeod* v. *Threlkeld*, 319 U. S. 491." 146 F. 2d 438 at 440 (C. C. A. 2d, 1944).

In *McLeod* v. *Threlkeld*, 319 U. S. 491 (1943), this Court, in holding that a cook for workers engaged in commerce was not himself engaged in commerce, established the test for determining whether an employee is 'engaged in commerce' (p. 497):

> "The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase 'production of goods for commerce.'
>
> "It is not important whether the employer, in this case the contractor, is engaged in commerce. It is the work of the employee which is decisive. Here the

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employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other."

In *Overstreet* v. *North Shore Corporation*, 318 U. S. 125 (1943), this Court stated that it would look to the Federal Employers' Liability Act and cases decided thereunder in determining the coverage intended by the phrase "engaged in interstate commerce" as used in the Fair Labor Standards Act, saying at pages 128-9 and 131-2:

> "A practical test of what 'engaged in interstate commerce' means has evolved in cases arising under the Federal Employers' Liability Act (45 U. S. C. § 51 *et seq.*, 45 U. S. C. A. § 51 *et seq.*) which, before the 1939 amendment (see 53 Stat. 1404, 45 U. S. C. A. §§ 51, 54, 56, 60), applied only where injury was suffered while the carrier was engaging in interstate or foreign commerce and the injured employee was employed by the carrier 'in such commerce.'
>
> "The Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. Both are aimed at protecting commerce from injury through adjustment of the master-servant relationship, the one by liberalizing the common law rules pertaining to negligence and the other by eliminating sub-standard working conditions. We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the *Pedersen* [*Pedersen* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146] and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention."

In *McLeod* v. *Threlkeld*, 319 U. S. 491, the Court repeated the importance of the Federal Employers' Liability Act in measuring the scope of the Fair Labor Standards Act (p. 495):

> "• • • the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce, is applicable to employments 'in commerce' under the Fair Labor Standards Act."

Cases decided by this Court and lower courts uniformly held that a watchman guarding interstate commerce was not closely enough related to such commerce to be a part of it. In *New York Central Railroad Co.* v. *White*, 243 U. S. 188 (1916), this Court held that "a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad" (p. 191) was not covered by the Federal Employers' Liability Act. This Court said (page 192):

> "The test is, 'Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?' *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558."

In *Armour & Co.* v. *Wantock*, 323 U. S. 127 (1944), this Court said at page 131:

> "*McLeod* v. *Threlkeld* • • • which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged 'in commerce', and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce."

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Legislative history leaves no doubt as to the correctness of this Court's view that "the test of whether one is in commerce is obviously more exacting." In *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942), this Court said:

> "The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employees 'engaged in commerce in any industry affecting commerce'. See H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2; 83 Cong. Rec. 7749-50. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce.' H. Rep. No. 2738, 75th Cong., 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158, 9266-67. Moreover, in one of its intermediate stages, the measure incorporated the *Shreveport* doctrine, *Houston & Texas Ry.* v. *United States*, *supra*, in that it was specifically made applicable to intrastate production which competed with goods produced in another state. S. 2475, 75th Cong. 3rd Sess., as recommitted December 17, 1937, § 8(a). But, as reported by the House Committee on Labor, this provision was deleted. S. 2475, *supra*, as reported April 21, 1938; see H. Rep. 2182, *supra*."

C. Respondent's Employees Are Not Engaged "in the Production of Goods for Commerce."

1. Guards and Watchmen Are Covered by the Act Only When Their Duties Are Performed in Connection with the Operation of an Enterprise Producing Goods for Commerce and They Are Not Covered When Such Duties Are Performed Solely in Connection with an Enterprise Engaging in Commerce.

The language of the Fair Labor Standards Act, the intent of Congress in passing and amending the Act, the Supreme Court and all lower courts considering the matter, as well as the Wage and Hour Administrator and Secretary of Labor in construing the Act, have limited

the applicability of the Act to guards and watchmen whose duties are performed at an establishment which produces goods for commerce. In short, guards and watchmen are brought within the Act by the "production" rather than by the "commerce" provisions of the Act. In the absence of activities constituting *production* for commerce, guards and watchmen are outside the Act.

Statutory Language and Congressional Intent. Section 3(j) of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. § 203) provides:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, • • •."

Originally, the following phrase concluded the definition:

> "or in any process or occupation necessary to the production thereof, in any State."

The 1949 amendment substituted for that phrase this one (63 Stat. 910):

> "or in any closely related process or occupation directly essential to the production thereof, in any State."

In the Conference Report upon the Fair Labor Standards Amendments of 1949, H. R. 1453, 81st Cong., 1st Sess., the House Managers reported at page 14:

> "Coverage under the act for a large category of employees is determined by the definition of the term 'produced.' The definition is divided into two parts. The first part, which the conference bill leaves unchanged, covers any employee 'producing, manufacturing, mining, handling, transporting, or in any other manner working on • • • goods.' Thus the first

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part covers employees engaged in actual production activities *as opposed, for example, to employees engaged in maintenance, clerical, or custodial work.*" (Emphasis added.)

It is clear that the employees in this case are not covered by the first part of the definition. The stipulated facts in the present case provide as follows (R. 50):

"Defendant's employees employed at the Wentworth Warehouse, the Ashland Avenue Warehouse and Garage, the 63rd Street Warehouse, and the alley between the State Street Store and the Wabash Avenue Warehouse do not physically handle the goods received at or shipped from said warehouses, except insofar as they may handle stolen goods recovered by defendant's employees, as described in paragraphs 8(e), 17(e), and 31(d) hereof. The total amount of stolen goods recovered by defendant's employees is approximately $300.00 per year."

The Conference Report continues:

"The second part of the present definition, covering any employee engaged in '*any* process or occupation *necessary* to the production' of goods, has been interpreted by the Administrator and the courts to cover employees of many local merchants, because some of the customers of such merchants are producing goods for interstate commerce. * * *

"Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above-cited cases. On the other hand, the proposed changes are not intended to remove from the act maintenance, custodial, and clerical employees *of manufacturers, mining companies, and other producers of goods for commerce.*" (Emphasis added.)

In the Statement of a majority of the Senate Conferees on the Fair Labor Standards Amendments of 1949, Cong.

Rec., 81st Cong., 1st Sess., pp. 15368-15377 (Oct. 19, 1949), the following appears:

> "Typical of the classes of employees whose work is closely related and directly essential to production, within the meaning of section 3(j) as amended by the conference agreement, are the following employees performing tasks necessary to effective productive operations of the producer: * * *
>
> "3. Plant guards, watchmen, and other employees performing protective or custodial services *for producers of goods.*" (Emphasis added.)

In the Statement of the Chairman of the House Committee on Education and Labor, on the House Conference Report, Cong. Rec., 81st Cong., 1st Sess., pp. 15135-15136 (Oct. 18, 1949), the following appears:

> "Employees engaged in activities which are several degrees or stages removed from the production of goods for commerce cannot be said to be engaged in a process or occupation closely related thereto."

These statements evince a clear understanding on the part of members of Congress that guards of plants producing for commerce are to be distinguished from guards of enterprises engaging in commerce. The distinction drawn by Congress must control the judicial interpretation of the coverage afforded by the Fair Labor Standards Act.

Supreme Court Cases. In *Walton* v. *Southern Package Corporation,* 320 U. S. 540 (1944), this Court held that the night watchman at a veneer manufacturing plant which shipped a substantial portion of its product in interstate commerce was "necessary to the production" of veneer and within the coverage of the Act. The decision was based solely and completely upon *A. B. Kirschbaum Co.* v. *Walling,* 316 U. S. 517 (1942), which was the only case cited. Mr. Justice Roberts concurred in the result "considering himself bound by the decision in *A. B. Kirsch-*

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baum Co. v. *Walling.*" This Court quoted from the *Kirschbaum* case the statement that "the maintenance of a safe, habitable building is indispensable to that activity [production]" and that the relationship of Walton's employment to production was therefore not "tenuous" but had that "close and immediate tie with the process of production for commerce" which brought him within the coverage of the Act.

In *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942), the question decided was stated by the Court:

> "The employees here are engaged in the operation and maintenance of a loft building in which large quantities of goods for interstate commerce are produced. Does the Fair Labor Standards Act extend to such employees?"

In holding that the Act did apply, this Court construed only one clause of the Act—"necessary to the production." This Court said:

> "The normal and spontaneous meaning of the language by which Congress defined in § 3(j) the class of persons within the benefits of the Act, to wit, employees engaged 'in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof,' encompasses these employees, in view of their relation to the conceded production of goods for commerce by the tenants
> * * *
> "* * * 'Necessary' is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority. We cannot, in construing the word 'necessary', escape an inquiry into the relationship of the particular employees to the production of goods for commerce."

In *10 East 40th Street Bldg., Inc.* v. *Callus*, 325 U. S. 478 (1945), this Court, in holding that watchmen and

maintenance employees of an office building housing various tenants engaged in commerce were not covered by the Act so long as no manufacturing was carried on within the building, made a clear distinction between watchmen of production who are subject to the Act (as in the *Kirschbaum* case) and watchmen of commerce who are not subject to the Act (*Callus* case).

In *McLeod* v. *Threlkeld*, 319 U. S. 491 (1943), this Court held that a cook employed to feed maintenance-of-way workers on an interstate railroad was not covered by the Fair Labor Standards Act. In that same case, this Court stated with approval the fact that two Courts of Appeal had held that cooks employed to feed workers engaged in the production of goods for commerce were covered by the Act (p. 493, footnote 4; *Hanson* v. *Lagerstrom*, 133 F. 2d 120 (C. C. A. 8th, 1942) and *Consolidated Timber Co.* v. *Womack*, 132 F. 2d 101 (C. C. A. 9th, 1942)). It requires but the substitution of the word "watchman" for the word "cook" to conclude that a watchman employed to guard workers engaged in the production of goods for commerce is covered by the Act but a watchman employed to guard workers engaged in commerce is not covered.

In the *McLeod* case, this Court said at page 493:

> "McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause. Our question is whether he was 'engaged in commerce.' "

The dissenting opinion in that case pointed out at page 501:

> "If the applicable provision were 'engaged in the production of goods for commerce' instead of 'engaged in commerce,' our decisions make it clear that employees such as the janitor and the shop tender and probably petitioner would be within the Act."

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Lower Court Cases. In *Engebretsen* v. *E. J. Albrecht Co.*, 150 F. (2d) 602 (C. C. A. 7th, 1945), the Court of Appeals said at page 604:

> "It has been held that an employee who acts as a guard is engaged in the production of goods in commerce, if the employer is so engaged." [Citing cases.]
>
> "Under the plain language of the statute and under the decisions we are convinced that plaintiff was required to show: (a) that he was an employee, (b) that his employer was engaged in the production of goods for commerce, and his was an occupation necessary to such production; or, that he was (a) an employee (b) who is engaged in commerce.
>
> "In reaching our conclusion we must look to the employee's activity rather than the employer's activity, so far as 'engaged in commerce' determines liability. * * * However, where the employer is engaged in the production of goods for commerce, we need look only to see if the employee's work is essential thereto.
>
> "That he [a watchman] was an employee is not in dispute. That the character of his employment, namely, that of a guard, brought him within the language of the statute, we think clear, *provided the company was engaged in the production of goods for commerce.*" (Emphasis in Court's opinion.)

In *Carrigan* v. *Provident Trust Co.*, 153 F. (2d) 74 (C. C. A. 3rd, 1946), the Court held that a guard employed by a bank which admittedly was engaged in interstate commerce but did not produce goods, was not subject to the Act. The Court said at page 75:

> "An important distinction between the two definitions is evident. Congress described 'production' to include acts merely necessary to the production of goods. 'Commerce' on the other hand, is so closely circumscribed that acts merely necessary to commerce are not included. The wide variation in the scope of the two terms has been frequently noted.
>
> "The employees concerned in [*A. B. Kirschbaum*

> *Co.* v. *Walling*, 316 U. S. 517] • • • serviced *buildings occupied by tenants* principally engaged in the production of goods for interstate commerce. In sharp contrast the Court in *McLeod* v. *Threlkeld*, 319 U. S. 491, held a cook for maintenance-of-way employees of an interstate railroad not 'engaged in commerce' and therefore not within the coverage of the Act.
>
> "In the instant case it is admitted that appellee bank did not produce goods. Hence, appellant-employee was not 'engaged in the production of goods for commerce,' and cases involving such production are not authoritative herein and are confusing."

The Court further stated at page 76:

> "But for a rather remote possibility that the law would be violated by a person or persons violently and forcefully breaking into the bank premises with the intent of robbery, or that some emergency should arise as a fire or leaky pipe, the watchman's services would have no effect upon commerce, and even then the effect of the watchman's acts would be negative and not acts in commerce. He had no hand whatever in the affirmative acts which constitute commerce. No act within the scope of the appellant's duty touches any facet of the acts of commerce in which the bank was engaged. The watchman's services were separate and distinct from any function of the bank which goes into the conception of interstate commerce."

In *Slover* v. *Wathen*, 140 F. 2d 258 (C. C. A. 4th, 1944), the watchman held to be subject to the Act was clearly engaged in the production of goods and the Court said at page 260:

> "Innumerable other cases also hold that *watchmen who are employed* to guard and protect property *for employers engaged in the production of goods for commerce* come within the provisions of the Act." (Italics added.)

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In *Russell Co.* v. *McComb*, 187 F. (2d) 524 (C. A. 5th, 1951), the Court said that "the night watchman in question is employed to guard appellant's premises, including the warehouse building, offices, the area inside in which the *coffee and rice are packaged* for distribution * * *" (page 525, italics added). The Court found that the watchman was engaged in the production of goods for commerce.

On the other hand the same Court of Appeals and the same Circuit Judge (McCord) in *Phillips* v. *Graham Aviation Co.*, 157 F. (2d) 443 (C. C. A. 5th, 1946), stated as follows at pages 443-4:

> "* * * appellants were employed as guards and watchmen by the Graham Aviation Company * * * in Georgia. Their duties and responsibilities were the usual ones of guards and watchmen to protect and safeguard persons and property on the premises of the employer.
>
> "Under contract with the United States Government, Graham Aviation Company was engaged in the training of student fliers for service in the air forces of the nation. Students from various parts of the United States were assigned to the field by military authorities. It is alleged that airplanes engaged in government service were frequently serviced and repaired at the field; that a canteen which sold goods that had been procured from the channels of interstate commerce, was operated for the benefit of students; and that planes from the field frequently crossed state lines—some going to Pennsylvania where appellee maintained another training field.
>
> "There is no issue as to the 'production of goods for commerce,' and appellants must stand or fall on the issue of whether they are 'engaged in commerce.' It is unnecessary to discuss whether appellee's business of training student fliers for the government and operating a flying field for that purpose can be considered interstate commerce, for under the Fair Labor Standards Act and the many decisions it is clear that in such

> cases as this the work of the particular employee is decisive. * * * The work of these appellants was purely local in character; a mere guarding of the local airfield and the personnel and property thereon. On the facts of this case, a holding that such activity is 'interstate commerce' would be stretching coverage beyond the breaking point to include a situation far beyond the pale of the act."

In *Walling* v. *Sondock*, 132 F. (2d) 77 (C. C. A. 5th, 1942), the Court said at page 78:

> "Appellees operate an agency engaged in the business of furnishing guards or watchmen to various customers in and about Houston, Texas. * * * Upon these principles, *those watchmen charged with the protection and preservation of the buildings and machinery used to produce goods for commerce* perform duties having an essential relationship to the process of producing and distributing goods in interstate commerce."

That all the courts have recognized the distinction between guarding production and guarding commerce is conclusively established by the following chart, which shows the most important cases holding that guards are covered by the act only when the employer is engaged in the production of goods for commerce.

Case	Citation	Jurisdiction and Year	Employee Not Covered by FLSA	Employer Engaged in Commerce Only	Employee Covered by FLSA	Employer Engaged in Production of Goods for Commerce	Facts
10 E. 40th St. Bldg. Inc. v. Callus	325 U. S. 578	U. S. Sup. Ct. 1945	x	x			Watchman of building in which 48% of rented area occupied by executive offices of manufacturing companies
Walton v. Southern Package Corp.	320 U. S. 540	U. S. Sup. Ct. 1944			x	x	Night watchman for veneer manufacturing plant
Mitchell v. Famous Realty, Inc.	211 F. 2d 198	C. A. 2d, 1954			x	x	Guarded building housing tenants engaged in production
General Electric Co. v. Porter	208 F. 2d 805	C. A. 9th, 1954			x	x	Firemen protected production area
Mitchell v. Mercer Water Co.	208 F. 2d 901	C. A. 3rd, 1954			x	x	Maintenance workers of company furnishing gas to manufacturers
Union Nat. Bank v. Durkin	207 F. 2d 848	C. A. 8th, 1953			x	x	Guarded bank which conceded it produced goods
Russell Co., Inc. v. McComb	187 F. 2d 524	5th Circ. 1951			x	x	Guarded area where coffee and rice were packaged
Parham v. Austin Co.	158 F. 2d 566	5th Circ. 1946	x	x			Guarded plant construction
Wilson v. R. F. C.	158 F. 2d 564	5th Circ. 1946	x			x	Guarded housing of employees of manufacturing plant
Phillips v. Graham Aviation Co.	157 F. 2d 443	5th Circ. 1946	x	x			Guarded air field
Carrigan v. Provident Trust Co.	153 F. 2d 74	3rd Circ. 1946	x	x			Guarded bank

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Case	Citation	Jurisdiction and Year	Employee Not Covered by FLSA	Employer Engaged in Commerce Only	Employee Covered by FLSA	Employer Engaged in Production of Goods for Commerce	Facts
Engebretsen v. E. J. Albrecht Co.	150 F. 2d 602	7th Circ. 1945			x	x	Guarded area where materials required for building dams, etc., were repaired
Building Service Employees Internation Union v. Trenton Trust Co.	142 F. 2d 257	3rd Circ. 1944	x	x			Guarded trust company
Blumenthal v. Girard Trust Co.	141 F. 2d 849	3rd Circ. 1944	x	x			Caretaker of apartment building
Slover v. Wathen	140 F. 2d 258	4th Circ. 1944			x	x	Watchman at pier where barges were repaired
Noonan v. Fruco Construction Co.	140 F. 2d 633	8th Circ. 1943	x	x			Guarded construction of building for manufacture of munitions
Convey v. Omaha National Bank	140 F. 2d 640	8th Circ. 1943	x	x			Guarded bank building
Lofther v. First National Bank	138 F. 2d 299	7th Circ. 1943	x	x			Guarded bank building
Waller v. Humphreys	133 F. 2d 193	5th Circ. 1943	x	x			Guarded sea food plant when not in operation
Walling v. Sondock	132 F. 2d 77	5th Circ. 1942			x	x	Independent agency guarding producers
Johnson v. Dallas Downtown Dev. Co.	132 F. 2d 287	5th Circ. 1942	x	x			Guarded insurance company building
Mid-Continent Pipe Line Co. v. Hargrave	129 F. 2d 655	10th Circ. 1942			x	x	Guarded pipe line
Messenger v. T. C. Co.	107 F. S. 354	Okla. 1951			x	x	Guarded cotton compressing operations

Case	Citation	Jurisdiction and Year	Employee Not Covered by FLSA	Employer Engaged in Commerce Only	Employee Covered by FLSA	Employer Engaged in Production of Goods for Commerce	Facts
Haynie v. Hogue Lumber & Supply Co.	96 F. S. 215	Miss. 1951	x	x			Guarded lumber yard
Craig v. Heide & Co.	94 F. S. 442	N. C. 1951			x	x	Guarded repair of vessels
Moehl v. DuPont & Co.	84 F. S. 427	Ill. 1947			x	x	Guarded ordnance plant
Bauler v. Pressed Steel Car Co.	81 F. S. 172	Ill. 1948			x	x	Guarded production of military goods
Campbell v. Jones & Laughlin Steel Co.	70 F. S. 996	Penn. 1947			x	x	Guarded steel plant
Lewis v. Florida Light & Power Co.	69 F. S. 23	Fla. 1946			x	x	Guarded electric generating plant
Walling v. West Kentucky Coal Co.	60 F. S. 681	Tenn. 1944			x	x	Guarded coal mine
Cushway v. Stork Engineering Co.	51 F. S. 568	Mich. 1943			x	x	Guarded factory
Hinkler v. 83 Maiden Lane	50 F. S. 263	N. Y. 1943	x	x			Guarded building housing insurance company
Reliance Co. v. Hubbard Storage & Inspection Co.	50 F. S. 1012	Va. 1943			x	x	Guarded raw tobacco prior to manufacture
Timberlake v. Day & Zimmerman, Inc.	49 F. S. 28	Iowa 1943			x	x	Guarded ordnance plant
Fleming v. Stillman	48 F. S. 609	Tenn. 1943			x	x	Guarded automobile reclamation plant
Bartholome v. Baltimore Fire Patrol Co.	48 F. S. 98	Md. 1942	x	x			Independent detective agency guarding various types of enterprises

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Administrative Interpretation. The Wage and Hour Administrator and later the Secretary of Labor have consistently construed the Act to include guards and watchmen only when they were guarding production.

Interpretative Bulletin No. 1 (as issued on October 12, 1938) provided in part in paragraph 5:

> "The second category of workers included, those engaged 'in the production of goods for (interstate) commerce,' applies typically but not exclusively, to that large group of employees engaged in manufacturing, processing, or distributing plants, a part of whose goods moves in commerce out of the State in which the plant is located. This is not limited merely to employees who are engaged in actual physical work on the product itself, because by express definition in section 3(j) an employee is deemed to have been engaged 'in the production of goods, if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation, necessary to the production thereof, in any State.' *Therefore the benefits of the statute are extended to such employees as maintenance workers, watchmen, clerks, stenographers, messengers, all of whom must be considered as engaged in processes or occupations 'necessary to the production' of the goods.*"

Interpretative Bulletin, Part 776, Subpart A—General, "General Coverage of the Wage and Hours Provisions" (May, 1950) provides in part in Section 776.11:

> "On the other hand, work which is less immediately related to the functioning of instrumentalities of commerce than is the case in the foregoing examples may be too remote from interstate or foreign commerce to establish coverage on the ground that the employee performing it is 'engaged in commerce.' This has been held true, for example, of a cook preparing meals for workmen who are repairing tracks over which interstate trains operate (*McLeod* v. *Threlkeld*, 319 U. S.

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491), and of a porter caring for washrooms and lockers in a garage which is not an instrumentality of commerce, where trucks used both in intrastate and interstate commerce are serviced (*Skidmore* v. *John J. Casale, Inc.*, 160 F. 2d 527, certiorari denied 331 U. S. 812, use in interstate commerce of trucks serviced was from 10 to 25 percent of total use)."

In relation to the case last cited, it may be noted that the guards in the present case guarded warehouses, out of which 2% (Wabash warehouse; R. 47-8) to 20% (Wentworth and Ashland warehouses; R. 17, 31-2) of all goods distributed were destined for Indiana stores or customers outside the State of Illinois.

Despite the Secretary of Labor's attempts to explain it in his brief, the fact is that watchmen have been held to be covered only when they were guarding production; the additional circumstance in some of the cases that they were *also* guarding commerce does not alter the fact. It is as though, assuming that criminal penalties were established by judicial precedent rather than by statute, respondent here produced a vast amount of authority in which the crime of murder resulted in the death penalty and the Secretary of Labor responded that in some of the cases the criminal was charged with petty larceny in addition to murder and therefore the death penalty is also the punishment for petty larceny. In other words the point is not that commerce may not also be involved, but that watchmen have never been held to be covered unless their employers were engaged in the production of goods for commerce.

2. The Function of Warehousing May Constitute Engaging in Commerce But Does Not Constitute the Production of Goods for Commerce; the Storage of Goods and the Carriage or Transportation of Goods Are Commerce But Are Not Production.

Again, it can be shown that the language of the Fair Labor Standards Act and Congressional intent, the Supreme Court and all lower courts considering the problem, as well as the Wage and Hour Administrator and Secretary of Labor in construing the Act, have held that the function of warehousing may amount to engagement in commerce but never constitutes production for commerce.

Statutory Language and Congressional Intent. Congress was intent primarily on regulating the wages and hours of work of employees handling goods *before the goods begin* their interstate journey and secondarily, *while the goods are on* their interstate journey, but not *after the goods have completed* their interstate journey. If it had been the intention of Congress to regulate the third as well as the first two stages, it would have been a simple matter to say so by adding to the words "in the production of goods *for* commerce" and "*in* commerce" the phrase "in the handling of goods *from* commerce," or, as in the case of the definition of "production for commerce" with respect to employees in the state of origin, by expanding the definition of "in commerce" to include employees handling goods after their arrival in the state of destination.

The President's Message of May 24, 1937, to the First Session of the Seventy-Fifth Congress, recommending national legislation with respect to wages and hours of certain employees, said in part (H. Doc. 255; 81 Cong. Rec. 4960 and 4983; S. Rep. No. 884, p. 1; H. Rep. No. 1452, p. 5):

"* * * we propose that only goods which have been

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> produced under conditions which meet the minimum standards of free labor *shall be admitted to interstate commerce.*"

The original bill (S. 2475 and H. R. 7200) applied to "employees in any occupation in which such employees are engaged in interstate commerce or are engaged in the production of goods which are *sold or shipped* to a substantial extent *in interstate commerce.*"

In testimony during joint hearings on the Fair Labor Standards Act bills (Joint Hearings Before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess.), Assistant Attorney General (later Mr. Justice) Jackson said (pp. 39-40):

> "It is intended to catch unfair labor practices at the point of production. * * * They must be fair goods if they move across the State line."

Mr. Leon Henderson testified that the proposed Act would cover those engaged in "industry" but not those engaged in "distribution and service" (p. 159).

At one point in the legislative history of the Act the House passed a bill (83 Cong. Rec. 7449) which regulated "every employer engaged in commerce in an industry *affecting* commerce" (Sections 4 and 5); defined an employer "engaged in commerce" as "an employer in commerce, or an employer engaged, in the ordinary cause of business, in *purchasing* or selling goods in commerce" (Section 3); and created administrative authority to declare an industry to be an "industry *affecting* commerce" if such industry was "dependent for its existence upon substantial *purchases* or sales of goods in commerce and upon transportation in commerce" (Section 6). This bill and the Senate bill went to conference, and the event of legislative history which cannot be overemphasized is that every

reference to "*purchasing*" in commerce and every reference to "*affecting*" commerce was struck from the Act. The bill was deliberately and thoughtfully reduced in scope to cover only employees *in* commerce or *in production for* commerce. Congress unmistakably showed its intention to go no further and not to include any employees handling goods *from* commerce.

The coverage of Sections 6 and 7 of the Act as finally enacted plainly was intended to be no more extensive than that of Section 8 providing for wage orders for "each *industry* engaged *in* commerce or *in the production of goods for* commerce," as is further emphasized by the declaration of policy in Section 2 that the purpose of the Act is to regulate "*industries* engaged in commerce or in the production of goods for commerce," yet any definition of warehousing by local retailers as an "industry" for such a wage order seems anomalous on its face. Moreover, an "industry committee" is directed by Section 8(c)(1) to "consider among other relevant factors * * * competitive conditions as affected by transportation, living and production costs," factors suited to production industries but not to storing or warehousing functions.

Supreme Court Cases. This Court has been entirely consistent in its consideration of warehouse employees as being engaged, in some situations, in commerce and, under other circumstances, in purely local activities, but never as engaged in production for commerce.

In *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (1943), the issues involved were described by this Court at pages 566-7:

> "The District Court held that none of respondent's employees in the seven branch [ware-] houses in question were subject to the Act. The Circuit Court of Appeals reversed. *Jacksonville Paper Co.* v. *Fleming*, 5 Cir., 128 F. 2d 395, 397. (1) It held that employees

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> who are engaged in the procurement or receipt of goods from other states are *'engaged in commerce'* within the meaning of § 6(a) and § 7(a) of the Act. (2) It also held that where respondent 'takes an order' from a customer and fills it outside the state and the goods are shipped interstate 'with the definite intention that those goods be carried at once to that customer, and they are so carried, the whole movement is interstate' and the entire work of delivery to their final destination is an employment *'in commerce.'* Those were the only types of transaction which the court held to be covered by the Act."

In other words, the entire problem was whether certain warehouse employees were engaged either in commerce or in local activities outside the scope of the Act. This Court expanded the coverage established by the Court of Appeals by holding that certain of the employees which the lower court had considered to be engaged in local activities, were actually engaged in commerce. None of the employees was ever considered to be engaged in production for commerce. This Court said at pages 567-8:

> "There is no indication (apart from the exemptions contained in § 13) that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. As in the case of an agency (cf. *De Loach* v. *Crowley's Inc.*, 5 Cir., 128 F. 2d 378) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom

> they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce."

In *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490 (1945), the issues were described at pages 492-3:

> "The District Court granted the injunction, holding (1) that the warehouse and central office employees were *engaged in interstate commerce* within the meaning of the Act and (2) that they were not exempted from the wage and hour provisions by reason of Section 13(a)(2) since the warehouse and office building did not constitute a retail establishment. D. C., 40 F. Supp. 749. The First Circuit Court of Appeals affirmed as to both points. 144 F. 2d 102. Petitioner, however, has sought review here only as to the second point. And certiorari was granted because of the *conflicting views expressed on this issue* by lower appellate courts."

In the *Phillips* case there was no dispute whatever over the proposition that warehouse employees, if covered by the Act, were covered because they were engaged in commerce. The only dispute was over the issue of whether a warehouse which was part of a large chain-store operation constituted a retail establishment. At no point in the *Phillips* case were any of the warehouse employees considered to be engaged in production for commerce. This Court said at page 497:

> "Here petitioner's warehouse and central office employees are performing wholesale duties *in the very midst of the stream of interstate commerce.* They constantly deal with both incoming and outgoing interstate shipments."

The lower court in the *Phillips* case (*A. H. Phillips, Inc.* v. *Walling*, 144 F. 2d 102 (C. C. A. 1st, 1944)) said at page 104:

> "Nowhere does it appear in the case at bar that the

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appellant denies that its warehouse and central office employees are *engaged in interstate commerce.* From the stipulated facts it is clear that these employees are engaged in work involving the receipt of merchandise from outside the state and in delivering merchandise from the warehouse to the retail stores in Connecticut. Further these goods come from points outside the state and after passing through the warehouse reach their final destination in the local retail stores. There is present that particularity in the continuity of their movement which shows that their entry in the warehouse was but a temporary pause in their interstate journey and they remain in interstate commerce until they are delivered at the retail stores."

The "conflicting views" expressed on the issue of what constitutes a retail establishment "by lower appellate courts" were identified by this Court in a footnote to its opinion on page 493:

> "The decision below in this case is in accord with the reasoning of *Walling* v. *American Stores Co.*, 3 Cir., 133 F. 2d 840, but is in conflict with *Allesandro* v. *C. F. Smith Co.*, 6 Cir., 136 F. 2d 75; *Walling* v. *L. Wiemann Co.*, 7 Cir., 138 F. 2d 602, 150 A. L. R. 878; and *Walling* v. *Block*, 9 Cir., 139 F. 2d 268."

It is important to note that although there existed a conflict of views over the retail establishment exemption, there was a unanimity of view by all of these important Courts of Appeal upon the issue as to whether warehouse employees are engaged in commerce or in production of goods for commerce.

In *Walling* v. *American Stores Co.*, 133 F. 2d 840 (C. C. A. 3rd, 1943), the court said at page 846:

> "We think the conclusion from these facts is clear that there is in this case a practical continuity of movement of the goods until they reach the defendant's retail stores. The maintenance of the warehouse, as

> we read the findings of fact, is not to break that continuity but to make it even, economical and uninterrupted. *The conclusion, therefore, is that all of the defendant's warehouse employees are engaged in commerce within the meaning of the Act.*"

In *Allesandro* v. *C. F. Smith Co.*, 136 F. 2d 75 (C. C. A. 6th, 1943), the court said at page 76:

> "• • • all of the appellants who are employed in unloading interstate cars and moving merchandise into warehouses, or from the cars to the stores, are *engaged in interstate commerce* and within the coverage of the Act."

In *Walling* v. *L. Wiemann Co.*, 138 F. 2d 602 (C. C. A. 7th, 1943), the court said at page 604:

> "Appellant insists that appellee's warehouse and central offices employees are *engaged in interstate commerce.* • • •"

In *Walling* v. *Block*, 139 F. 2d 268 (C. C. A. 9th, 1943), the Court said at page 269:

> "*The trial court found* as a fact that the receipt of the goods and their subsequent distribution through the Seattle warehouse did not involve interstate commerce, that is to say, *that the employees there are not engaged in commerce. However, for purposes of decision we assume the contrary.*"

A close analysis of the Secretary's position in this case will reveal that he is contending here that all activity of any kind whatsoever except transportation is "production," thus conveniently disposing of what he apparently finds to be a somewhat bothersome and limiting concept of "engaging in commerce." Under this contention there is no longer any handling in the stream of commerce nor any local handling of goods: if any employee so much as touches goods he is engaged in its production for interstate commerce; if a watchman sees the handling, he is also pro-

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ducing. The result of such reasoning is to destroy entirely the heretofore unchallenged Congressional intent to make the Fair Labor Standards Act cover less area than constitutionally possible and to convert the Act into one which undoubtedly would cover more area than constitutionally possible.

It is not true that any "handling" constitutes production. The Supreme Court has made it clear that there can also be "handling" in commerce. In *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490 (1945), this court stated at page 503:

> "The next inquiry is whether the Western Union Telegraph Company is a producer of these goods within the Act. Congress has laid down a definition that as used in the Act ' " produced" means produced, manufactured, mined, handled, or in any other manner worked on * * *.' § 3(j). The Company, says the Government, not only 'handles' the message but 'works on' it.
>
> "The Government contends that in defining 'produced' the statute intends 'handled' or 'worked on' to mean not only handling or working on in relation to producing or making an article ready to enter interstate transit, but also includes the handling or working on which accomplishes the interstate transit or movement in commerce itself. If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a 'producer' of any goods he carries. But the statute, while defining 'produced' to mean 'handled' or 'worked on', has not defined 'handled' or 'worked on'. These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. They serve a useful purpose when read to relate to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce. One who packages a product, or bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment might otherwise escape the Act, for in a sense he

neither manufactures, produces, or mines the goods. We are clear that 'handled' or 'worked on' includes every kind of incidental operation preparatory to putting goods into the stream of commerce.

"If we go beyond this and assume that handling for transit purposes is handling in production, we encounter results which we think Congress could not have intended."

Lower Court Cases. In *Donovan* v. *Shell Oil Co., Inc.*, 168 F. (2d) 229 (C. C. A. 4th, 1948), the company had "no refinery in the State of Maryland, but it does maintain a bulk depot plant at Wagners' Point, Maryland." The Court held that "it is not and could not be disputed that the portion of the defendant's business with which we are here concerned, *i. e.*, the transportation of petroleum products into the State of Maryland from without the state, and *the subsequent distribution to points within and without Maryland, was commerce.*" Therefore the employer "was so closely related to the stream of commerce as to form a part of it." (Page 231; emphasis added.)

In *Walling* v. *American Stores Co.*, 133 F. (2d) 840 (C. C. A. 3rd, 1943), the Court held at page 846:

"We think the conclusion from these facts is clear that there is in this case a practical continuity of movement of the goods until they reach the defendant's retail stores. The maintenance of the warehouse * * * is not to break that continuity but to make it even, economical and uninterrupted. The conclusion therefore, is that all of the defendant's warehouse employees are engaged in commerce within the meaning of the Act."

In *Marchant* v. *Sands Taylor & Wood Co.*, 75 F. Supp. 783 (D. Mass., 1948), the Court held (at pages 784-785):

"[The defendant employer, a wholesaler in flour, coffee and tea] had warehouses in Somerville, Massachusetts (where the plaintiff was employed), Worces-

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ter, Massachusetts, and Providence, Rhode Island, as well as regular jobbers in New Hampshire. The plaintiff regularly shipped merchandise from the warehouse at Somerville for delivery to the warehouse in Providence, and to jobbers in other states. *The plaintiff was engaged in commerce within the meaning of the Act.* His work involved the interstate delivery of defendant's merchandise." (Emphasis added.)

At pages 786 and 787, the Court describes in some detail the character of the employee's activities:

"He made up loading lists for the trucks * * * He watched the inventory of flour * * * When a customer came to the warehouse for supplies, plaintiff rang a bell and summoned warehousemen to help the customer * * * When freight cars arrived, he summoned warehousemen to unload them. He collected the time-cards of other workers * * * He opened the warehouse in the morning and closed it at night * * * Plaintiff fired the coal stoker, parked trucks, ground coffee beans, and did other manual tasks regularly."

In *McComb* v. *Blue Star Auto Stores, Inc.*, 164 F. (2d) 329 (C. C. A. 7th, 1948), the Court *held* (at page 331):

"*Under the circumstances here appearing* it is now well settled that *warehouse* and central office employees who work either at selling or delivering across State lines, or at buying and receiving across State lines, *are employed in commerce* whether they write letters, keep books, or load or unload or drive the trucks * * * [citing cases]." (Emphasis added.)

As dictum the Court stated (at page 339):

"All employees engaged in procuring goods from other states for transportation to and delivery at employer's warehouses are engaged in 'commerce' within the meaning of the Act; likewise, employees engaged in unloading and checking goods shipped in interstate commerce, and in handling them on the platforms, as well as those engaged in shipping such goods from warehouses in Illinois to stores in another state are

> all engaged in the production of goods for commerce or in an occupation necessary to such production. *Walling* v. *Goldblatt Bros.*, 7 Cir., 152 F. 2d 475, 476."

In 152 F. 2d 475, the Court had held simply that the retail exemption did not apply to certain Goldblatt operations, and in *Walling* v. *Goldblatt Bros., Inc.*, 128 F. (2d) 778 (C. C. A. 7th, 1942), the Court held in connection with activities at Goldblatt warehouses that:

> *"Persons engaged in shipping goods to the Indiana stores are engaged in interstate commerce."* (Emphasis added.)

As we have previously shown in some detail, the Court did not hold in any of the *Goldblatt* decisions that employees performing a warehousing function (whether in connection with the receipt of goods into the warehouse, storage, or shipping out of the warehouse) were engaged in any activity other than commerce. It was held merely that certain employees involved in the manufacture or processing of goods were engaged in production for commerce.

Administrative Interpretation. The Wage and Hour Administrator and the Secretary of Labor, prior to this case, appear not to have contended that warehousing was production. To the contrary, they have explicitly stated that employees participating in warehouse activities (as opposed to guarding the scenes of such activities) are "engaged in commerce" rather than in "production for commerce", as the Secretary of Labor now contends.

Interpretative Bulletin No. 1 (as issued on October 12, 1938) provided in paragraph 4:

> "The first category of workers included, those 'engaged in (interstate) commerce,' applies, typically but not exclusively, to employees in the telephone, telegraph, radio, and transportation industries, since these industries serve as the actual instrumentalities

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and channels of interstate commerce. *Employees who are an essential part of the stream of interstate commerce are also included in the phrase 'engaged in commerce'; for example, employees of a warehouse whose storage facilities are used in the interstate distribution of goods.*"

Interpretative Bulletin, Part 776, Subpart A-General, "General Coverage of the Wage and Hours Provisions" (May, 1950) provides in part in Section 776.10:

> "Employees whose work is an essential part of the stream of interstate or foreign commerce, in whatever type of business they are employed, are likewise engaged in commerce and within the Act's coverage. *This would include, for example, employees of a warehouse whose activities are connected with the receipt or distribution of goods across State lines* (*Phillips Co.* v. *Walling*, 324 U. S. 490; *Clyde* v. *Broderick*, 144 F. 2d 348 (C. A. 10)."

The Secretary of Labor and, before him, the Wage and Hour Administrator have always been prone indiscriminately to charge every employee with being engaged both "in the production of goods for commerce" and "in commerce." While it is conceivable, and in a relatively few instances it is undoubtedly true, that a single employee may perform *separate functions* some of which involve him in engagement "in the production of goods for commerce" and others "in commerce," nevertheless the Supreme Court has made it abundantly clear in *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490, that *any particular function performed by an employee may be either a production function or a commerce function but it cannot be both at the same time.* If transportation by a carrier constitutes engaging in commerce, it cannot at the same time constitute engaging in the production of goods for commerce. This is the entire essence of *Western Union* v. *Lenroot.* Similarly, every court which has considered the question

has held that the warehousing function may be a commerce function but it is not production. Once goods are in the stream of commerce, production ceases. When commerce ceases, the handling of the goods is again a local activity. All of the goods in the Goldblatt warehouses is either in the stream of commerce or at the end of it.

CONCLUSION.

The Secretary of Labor is clearly attempting in this case to extend coverage of the Fair Labor Standards Act to a new and previously uncharted boundary beyond the intention and contemplation of Congress, beyond the furthest reaches of the most liberal judicial interpretations, and even beyond the Secretary of Labor's own previous conception of his authority under the Act.

The Joyce Agency employees are neither engaged in commerce nor in the production of goods for commerce.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 230

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

JOYCE AGENCY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MEMORANDUM ON BEHALF OF JOYCE AGENCY, INC.

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Petitioner,

vs.

JOYCE AGENCY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MEMORANDUM ON BEHALF OF JOYCE AGENCY, INC.

The judgment of the District Court, which the Secretary of Labor seeks to reinstate by requesting this Court to reverse the judgment of the Court of Appeals, provided for injunctive relief only (R. 19). Subsequent to the entry of such judgment on May 7, 1953, the respondent, Joyce Agency, Inc., ceased doing business and thereafter was dissolved as a corporation by the Secretary of State of Illinois (Affidavit of Edwin G. Boltz hereto attached). The suit for an injunction thereupon became moot.

In *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360, the return of cable lines whose possession had been taken by the Federal government was held to render moot a suit by the owners to enjoin Federal officers from interfering with the plaintiffs' property. This Court there held that it would not render advisory opinions on moot issues. In *Montgomery Ward & Co.* v. *United States of America,* 326 U. S. 690, this Court held that an action to determine the legal status of the seizure of the properties of Montgomery Ward & Co. had become moot after such properties were returned to the owners.

The fact that Joyce Agency, Inc., has ceased doing business and has been dissolved as a corporation renders this action moot.

Respectfully submitted,

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CROWLEY, SPRECHER & WEEKS.

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STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

AFFIDAVIT.

EDWIN G. BOLTZ, being first duly sworn on oath, deposes and says:

1. That he became a director and president of Joyce Agency, Inc., an Illinois corporation, on November 13, 1945, and held such positions until 1953.

2. That he had and has personal knowledge of the legal existence of Joyce Agency, Inc.

3. That prior to October 19, 1953, said Joyce Agency, Inc., was a corporation existing under the laws of the State of Illinois and prior to July 1, 1953, was engaged in the business of furnishing watchmen, guard, detective, fire inspection and shopping service to Goldblatt Bros., Inc.

4. That said Joyce Agency, Inc., is a party to the appeal heard on writ of certiorari by the Supreme Court of the United States in No. 230, October Term, 1954, James P. Mitchell, Secretary of Labor, United States Department of Labor, petitioner, *vs.* Joyce Agency, Inc.

5. That at a duly held meeting of the board of directors of said Joyce Agency, Inc., on September 17, 1953, it was announced that the corporation had ceased doing business since July 1, 1953, and it was resolved that a statement of intent to dissolve be filed.

6. That on September 30, 1953, a statement of intent to dissolve was filed with the Secretary of State of Illinois, and on October 6, 1953, was recorded in the Office of the Recorder of Deeds of Cook County as Document No. 15748187.

7. That said Joyce Agency, Inc., duly executed on October 16, 1953, articles of dissolution pursuant to section 80

of the Business Corporation Act of Illinois (Ill. Rev. Stat., 1953, Chap. 31, par. 157.80).

8. That a certificate of dissolution was issued to said Joyce Agency, Inc., by the Secretary of State of the State of Illinois, on October 19, 1953.

9. That on or about October 2, 1953, said Joyce Agency, Inc., duly executed and filed with the United States Internal Revenue Service form 966, return of information under section 148(d) of the Internal Revenue Code to be filed within 30 days after adoption of resolution of plan of dissolution, or complete or partial liquidation.

10. That on or shortly before July 1, 1953, and since such date, Goldblatt Bros., Inc., has not and does not use any employees of Joyce Agency, Inc., as watchmen, guards, detectives, fire inspectors, or in any other capacity.

11. That Joyce Agency, Inc., has wound up and terminated its affairs and is completely out of business.

EDWIN G. BOLTZ.

Subscribed and sworn to before me this 4th day of January, 1955.

L. R. HANSKE,
Notary Public.

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Office - Supreme Court, U.S.
FILED
FEB 2 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 230

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

JOYCE AGENCY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

COUNTERAFFIDAVITS ON BEHALF OF JOYCE AGENCY, INC., IN RESPONSE TO SECRETARY OF LABOR'S MOTION TO JOIN OR SUBSTITUTE GOLDBLATT BROS., INC., AS A PARTY.

STANFORD CLINTON,
134 North La Salle Street,
Chicago 2, Illinois,
ROBERT A. SPRECHER,
100 West Monroe Street,
Chicago 3, Illinois,
Attorneys for Defendant-Appellant.

Of Counsel:
PRITZKER, PRITZKER & CLINTON,
CROWLEY, SPRECHER & WEEKS.

THE CUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 230.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

JOYCE AGENCY, INC.,

Respondent.

AFFIDAVIT OF ROBERT A. SPRECHER.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

ROBERT A. SPRECHER, being first duly sworn, deposes and says that:

1. Affiant is an attorney licensed to practice law in the State of Illinois and one of the attorneys of record in the above-captioned case in the Court of Appeals and in the Supreme Court of the United States.

2. The evidence was taken in the District Court in the above-captioned case in April, 1952 (R. 61-92); the District Judge filed his memorandum setting forth his opinion in the case on March 19, 1953 (R. 93-99); and on May 7, 1953, the District Judge signed the Findings of Fact and Conclusions of Law and Judgment in the case (R. 101-119).

3. Between March 19 and May 7, 1953, affiant and Stanford Clinton had two meetings with Herman Grant, Re-

gional Attorney for the United States Department of Labor, for the purpose of discussing the proper form of the Findings of Fact and Conclusions of Law and Judgment to be presented to the District Judge; at the second of these meetings, Stanford Clinton advised Herman Grant that the respondent Joyce Agency, Inc., had ceased furnishing services to Goldblatt Bros., Inc., and intended to wind up its affairs, and requested Mr. Grant's opinion as to whether this fact, which had occurred subsequent to the taking of evidence in the District Court, should be suggested to or brought to the attention of the District Judge and Mr. Grant thereupon became exceedingly angry and responded that in his opinion it would be unfair and improper to do so.

4. Affiant has personal knowledge that the discontinuance by Joyce Agency, Inc., of the furnishing of services to Goldblatt Bros., Inc., and the intent of Joyce Agency, Inc., to wind up its affairs was brought directly to the attention of Herman Garnt prior to the entry of the Judgment by the District Court on May 7, 1953.

5. Stanford Clinton subsequently discussed with affiant whether the District Court should be advised that Joyce Agency, Inc., had discontinued its services to Goldblatt Bros., Inc., and concluded that since the corporation remained in existence and could conceivably resume furnishing such services, it was not necessary or desirable to do so, particularly in view of Mr. Grant's attitude.

6. Affiant had no knowledge that Joyce Agency, Inc., had been dissolved until after the Supreme Court granted certiorari and shortly before January 4, 1955, when he was advised of the dissolution by Stanford Clinton.

ROBERT A. SPRECHER.

Subscribed and sworn to before me this 1st day of February, 1955.

MARY J. BRENNAN,
Notary Public.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 230.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

JOYCE AGENCY, INC.,

Respondent.

AFFIDAVIT OF STANFORD CLINTON.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

STANFORD CLINTON, being first duly sworn, deposes and says that:

1. Affiant is an attorney licensed to practice law in the State of Illinois and one of the attorneys of record in the above-captioned case in the District Court, Court of Appeals, and Supreme Court of the United States; and that he is the member of the law firm of Pritzker, Pritzker and Clinton in charge of such litigation.

2. Prior to May 7, 1953, he notified Herman Grant, Regional Attorney for the Department of Labor, that Joyce Agency, Inc., had discontinued furnishing services to Goldblatt Bros., Inc., and that Joyce Agency, Inc., intended to wind up its affairs.

3. Upon information and belief, affiant states that

shortly subsequent to affiant's notifying Herman Grant that Joyce Agency, Inc., had discontinued serving Goldblatt Bros., Inc., the Department of Labor made an investigation of the Goldblatt Warehouses to determine the status of the guards and watchmen, which positions were at that time filled with employees of Goldblatt Bros., Inc.

4. Upon information and belief, affiant states that long prior to the commencement of this litigation in the District Court, Regional Attorney Herman Grant and other members of the staff of the Department of Labor were fully aware of the relation between Goldblatt Bros., Inc., and Joyce Agency, Inc., and Boltz and Boltz.

5. Affiant gave consideration to whether the District Court should be informed of the discontinuance by Joyce Agency, Inc., of the furnishing of services to Goldblatt Bros., Inc., but concluded that since the corporation was still in existence and could resume furnishing services it was not necessary to inform the District Court.

6. Although affiant understood that there were some future plans to dissolve Joyce Agency, Inc., he was never consulted about the actual dissolution and he had no knowledge of the dissolution or the proceedings to accomplish it until after the granting of certiorari by the Supreme Court; shortly after the granting of certiorari on October 14, 1954, affiant met with Herman Buckley, a Vice-President of Goldblatt Bros., Inc., Albert H. Dolin, head of the Legal Department of Goldblatt Bros., Inc., and Captain Joseph Goldberg, Security Chief of Goldblatt Bros., Inc., and was then told for the first time by Mr. Dolin that Joyce Agency, Inc., had been dissolved.

7. Although the civil lawsuits pending against Joyce Agency, Inc., will be determined adversely to the plaintiffs therein and favorably to Joyce Agency, Inc., if the Supreme Court should affirm the Court of Appeals herein, never-

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theless reversal by the Supreme Court of the decision of the Court of Appeals will *not* determine or decide the civil lawsuits since the District Court in those cases will be required to inquire into the particular duties of the plaintiffs therein and to determine other issues not involved in this case.

8. If Goldblatt Bros., Inc., should be made a party to this case at this time it would be deprived of its constitutional right to defend itself, since Goldblatt Bros., Inc., would not have agreed to the stipulation of facts filed in the District Court and would have raised additional defenses not raised by Joyce Agency, Inc., including the defense of *res judicata* and the law of the case inasmuch as many of the issues in this case have been previously adjudicated as to Goldblatt Bros., Inc.

STANFORD CLINTON.

Subscribed and sworn to before me this 1st day of February, 1955.

MARY J. BRENNAN.

(SEAL) *Notary Public.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 230.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

JOYCE AGENCY, INC.,

Respondent.

AFFIDAVIT OF ALBERT H. DOLIN.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

ALBERT H. DOLIN, being first duly sworn, deposes and says that:

1. Affiant is an attorney licensed to practice law in the State of Illinois and is employed by Goldblatt Bros., Inc., as Assistant Secretary and the head of its Legal Department, which handles the bulk of the legal work of Goldblatt Bros., Inc., the law firm of Pritzker, Pritzker and Clinton handling special legal assignments only.

2. Affiant supervised the preparation and filing of the statement of intent to dissolve and the articles of dissolution of Joyce Agency, Inc., and the entire procedure necessary to dissolve the corporation.

3. The sole reasons and motives for the dissolution of Joyce Agency, Inc., were business reasons and at no time

was affiant aware, nor did he consider, that dissolution would have any bearing on any legal issues in the above-captioned case; affiant recommended to the officers of Goldblatt Bros., Inc., that Goldblatt take over the functions performed by Joyce Agency, Inc., and that Joyce Agency, Inc., be dissolved for two reasons: (1) Goldblatt could perform the functions for at least $30,000 per year less than the cost of the services performed by Joyce Agency, Inc., and (2) direct control by Goldblatt of such functions would be more effective and efficient than performance of those functions by an outside corporation which had other and diverse interests.

4. In accordance with Illinois statutes, full and adequate provision was made for the satisfaction of any judgment, order or decree which may be entered against Joyce Agency, Inc., in any pending suit.

5. Affiant did not consult or discuss with Stanford Clinton or Robert A. Sprecher or either of them the dissolution of Joyce Agency, Inc., until after certiorari was granted by the Supreme Court in this case and, insofar as affiant knows, neither of them had any knowledge of the dissolution until after certiorari was granted.

ALBERT H. DOLIN.

Subscribed and sworn to before me this 1st day of February, 1955.

L. R. HANSKE.
Notary Public.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 230.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

JOYCE AGENCY, INC.,

Respondent.

AFFIDAVIT OF EDWIN G. BOLTZ.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

EDWIN G. BOLTZ, being first duly sworn, deposes and says that:

1. Affiant became a Director and President of Joyce Agency, Inc., an Illinois corporation, on November 13, 1945, and held such positions until 1953.

2. During its existence, the office of Joyce Agency, Inc., was located at 343 South Dearborn Street, Chicago, Illinois.

3. Joyce Agency, Inc., was, prior to its dissolution on October 19, 1953, a separate and distinct entity having customers and accounts other than Goldblatt Bros., Inc., which included Meyer's Department Store, Inc., Sulka & Co., and Belmont Radio Corporation, now called Raytheon Mfg. Co., and many others; these customers and accounts were not connected, either directly or indirectly, with Goldblatt

Bros., Inc., and Goldblatt Bros., Inc., had nothing whatsoever to do with their selection.

4. During February, 1953, the employment of the entire office personnel of Joyce Agency, Inc., was terminated and insofar as affiant knows, none of such office personnel was subsequently employed by Goldblatt Bros., Inc.

5. Affiant is a partner with his brother, Leonard W. Boltz, in Boltz and Boltz, a partnership performing labor relations services for many customers and accounts, including Spiegel, Inc., which has an annual volume of business of about $140,000,000, Alden's, Inc., which has an annual volume of about $90,000,000, L. Fish Furniture Co., and others; these customers and accounts are not connected, either directly or indirectly, with Goldblatt Bros., Inc.

EDWIN G. BOLTZ.

Subscribed and sworn to before me this 1st day of February, 1955.

MARY J. BRENNAN.

(SEAL) *Notary Public.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 230.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

JOYCE AGENCY, INC.,

Respondent.

AFFIDAVIT OF JOSEPH GOLDBERG.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

JOSEPH GOLDBERG, being first duly sworn, deposes and says that:

1. Affiant was a member of the City of Chicago Police Department for 38 years with the rank of Captain for 27 years; he retired from active duty under the Department's retirement pension plan on March 7, 1953 and on March 9, 1953, he was employed by Goldblatt Bros., Inc., as its Security Chief, and since that time has been in complete charge of security, including all guards and watchmen, at Goldblatt Bros., Inc.

2. Affiant's office is located in the State Street store of Goldblatt Bros., Inc.; neither affiant nor the employees of Goldblatts under his control and supervision, including guards and watchmen, handle any customers or accounts

other than Goldblatt; neither affiant nor the employees under his control have any connection with Joyce Agency, Inc., or Boltz and Boltz, nor with any of the customers and accounts formerly served by Joyce Agency, Inc., or presently serviced by Boltz and Boltz, nor with Edwin G. Boltz or Leonard W. Boltz or Marcella Main.

3. Affiant has reorganized the functions and procedures relating to security at Goldblatt Bros., Inc., which were formerly performed by Joyce Agency, Inc.; he has substantially changed, redistributed and realigned the activities, duties and functions of security personnel, including guards and watchmen; none of the former office personnel of Joyce Agency, Inc., is presently employed by Goldblatt Bros., Inc., and the functions formerly performed by Joyce Agency, Inc. office personnel are now performed by Goldblatt Bros., Inc. employees, whose labor conditions conform in all respects to the requirements of the Fair Labor Standards Act; at least sixty per cent (60%) of the personnel of Joyce Agency, Inc., other than office personnel, has been replaced by affiant.

4. The total number of persons employed as guards and watchmen at Goldblatt Bros., Inc., is approximately one hundred (100) and the number of persons employed at the Goldblatt warehouses involved in this Court is approximately twenty (20).

JOSEPH GOLDBERG.

Subscribed and sworn to before me this 1st day of February, 1955.

L. R. HANSKE.
Notary Public.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 230

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOYCE AGENCY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE TO MEMORANDUM ON BEHALF OF JOYCE AGENCY, INC., SUGGESTING THAT THE ACTION IS MOOT, AND MOTION TO JOIN OR SUBSTITUTE GOLDBLATT BROS., INC., AS A PARTY

This case is pending in this Court upon writ of certiorari granted on October 14, 1954 (R. 137). On January 6, 1955, counsel for respondent filed a "Memorandum on Behalf of Joyce Agency, Inc." stating that Joyce Agency, Inc., an Illinois corporation, has ceased doing business and has been dissolved as a corporation and that therefore this action is moot.

The Solicitor General, on behalf of petitioner, respectfully submits that the action is not moot, that under the law of Illinois respondent corpora-

tion is still in existence for purposes of prosecution and defense of this action, and that this Court has jurisdiction to proceed with the determination of the case on the merits. The Solicitor General, on behalf of the petitioner, also respectfully submits and moves that any doubt that the judgment on the merits will be effective should be resolved by joining or substituting Goldblatt Bros., Inc., as a party-respondent to this action.

Goldblatt Bros., Inc., also an Illinois corporation, has been the principal and substantially the sole account of respondent Joyce Agency, Inc., was responsible for the creation of that corporation, and has controlled its operations including the dissolution proceedings; moreover, the guards and watchmen and the functions involved in the pending litigation have been transferred to Goldblatt Bros., Inc.

The facts relied upon in support of this response and motion are contained in the printed record and in the annexed affidavit of Herman Grant.[1] These facts are summarized below in the Statement and Argument.

STATEMENT

This case arose on a complaint filed by the Secretary of Labor against the Joyce Agency, Inc., praying for an injunction restraining violations of the Fair Labor Standards Act. After trial, on

[1] The original of this affidavit has been filed in the office of the Clerk. A copy is reprinted as an appendix hereto, pp. 20–40, *infra*.

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May 7, 1953, the district court entered a judgment restraining defendant, "its officers, agents, servants, employees, attorneys, and all persons acting or claiming to act in its behalf and interest" from violating the overtime provisions of the Act, and further ordering and decreeing that "the plaintiff recover of and from the defendant his costs and disbursements herein" (R. 119). Defendant filed notice of appeal on July 1, 1953 (R. 120). The court of appeals, on March 29, 1954, reversed the district court's judgment on the ground that respondent's employees were not covered by the Act (R. 125–133). On petition of the Secretary of Labor, this Court granted a writ of certiorari on October 14, 1954 (R. 137). Petitioner's brief on the merits was filed December 9, 1954, and respondent's brief on the merits was filed January 6, 1955.

The affidavit attached to the memorandum filed by respondent in this Court on January 6, 1955, states that Joyce Agency, Inc., ceased doing business on July 1, 1953 (*i. e.*, the same date on which it filed its notice of appeal to the court of appeals), that it duly executed articles of voluntary dissolution, and that a certificate of dissolution was issued to it on October 19, 1953 (*i. e.*, about six months prior to the decision of the court of appeals, and some months prior to the submission of briefs and oral argument in that court).[2] Throughout the pendency of this case in the court of appeals, and

[2] Oral argument was held on March 1, 1954, and Joyce Agency's brief on appeal was filed December 9, 1953

in this Court prior to the memorandum of January 6, 1955, Joyce Agency, Inc., did not inform the petitioner or either court of its dissolution. The brief in opposition to certiorari did not mention or intimate this point. Petitioner was advised for the first time of the dissolution proceedings by respondent's memorandum in this Court of January 6, 1955 (*i. e.*, after the filing of petitioner's brief on the merits and simultaneously with the filing of respondent's brief on the merits).

As indicated in the attachments to the annexed affidavit of Herman Grant, a statement of intent to dissolve by voluntary consent and articles of dissolution were filed on behalf of Joyce Agency, Inc., pursuant to The Business Corporation Act of Illinois (Laws of Illinois 1933, p. 308, pars. 80 and 94; Laws of Illinois 1941, vol. 1, p. 421, par. 1; 1945, p. 544, § 1; Smith-Hurd Illinois Annotated Statutes, §§ 157.80 and 157.94).

Section 157.80 requires as a prerequisite to voluntary dissolution the execution of articles of dissolution setting forth, *inter alia:*

* * * * *

> (c) That all debts, obligations, and liabilities of the corporation have been paid and discharged or that adequate provision has been made therefor.
>
> * * * * *
>
> (e) That there are no suits pending against the corporation in any court, or that adequate provision has been made for the satisfaction of any judgment, order, or decree

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which may be entered against it in any pending suit.

Section 157.94 of the same chapter of the Illinois Business Corporation Act provides that—

> The dissolution of a corporation * * * shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.[3]

The record in the instant case, and the affidavit filed herewith, clearly indicate that Joyce Agency, Inc., has been dominated and controlled by Goldblatt Bros., Inc., and that Goldblatt Bros., Inc., initiated and was responsible for the dissolution proceedings. The intent to dissolve and the articles of dissolution were executed by Robert Gerlich as president of Joyce Agency, Inc., and attested by Gertrude Holter as secretary of Joyce Agency, Inc.

---

[3] A comparable provision relating to merger and consolidation provides (Section 157.69 (e)):

"Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted to judgment as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place."

(App. *infra*, pp. 22–23, 24, 28–29). Both Robert Gerlich and Gertrude Holter are at present, and for many years have been, employees of Goldblatt Bros., Inc. (App. *infra*, p. 23). Robert Gerlich has been employed by Goldblatt Bros., Inc., at least since 1943 and is currently employed as assistant tax manager. Gertrude Holter has been employed by Goldblatt Bros., Inc., at least since 1936 and is now employed as personal secretary to Goldblatt's tax manager (*infra*, p. 23).

Legal counsel Stanford Clinton of Pritzker, Pritzker and Clinton, representing Joyce Agency, Inc., throughout the pending litigation, has long been retained as legal counsel by Goldblatt Bros., Inc. The same legal counsel represented Goldblatt Bros., Inc., throughout the extended litigation between the Department of Labor and Goldblatt Bros., Inc., under the Fair Labor Standards Act, which involved two trials and three appeals to the court of appeals extending over a period of almost eight years (from April 16, 1940 to March 25, 1948). *Infra*, pp. 23–24. See also respondent's brief on the merits, pp. 6–13.

Goldblatt Bros., Inc., has controlled and actively participated in the operation of Joyce Agency, Inc., since its original organization in 1936, and particularly in the period immediately prior to and during the time involved in the pending litigation (*infra*, pp. 21–22). Throughout the period covered by this litigation, and for many years prior thereto, Goldblatt Bros., Inc., has been the principal and

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substantially the sole account of respondent Joyce Agency, Inc. (*infra*, p. 20; R. 70–71). The guards and watchmen involved in this litigation were transferred from the payroll of respondent to the payroll of Goldblatt Bros., Inc., on or about February 1, 1953, and many of said guards and watchmen have continued in the employ of Goldblatt until the present time (*infra*, pp. 20–21). Prior to their transfer to Goldblatt's payroll, Goldblatt was furnished weekly by Joyce Agency, Inc., with detailed cash disbursement reports and was billed for the total guard and watchmen payroll, plus the social security and unemployment compensation contributions due on the payroll, plus approximately 2½% for services. All of the books of Joyce Agency, Inc., were audited by an auditor in the employ of Goldblatt (*infra*, pp. 21–22; R. 53, 113).

Joyce Agency, Inc., was originally organized by Goldblatt to provide Goldblatt with a detective and watchman service. Goldblatt furnished the necessary capital for its organization, and controlled the stock of Joyce Agency, Inc. throughout its corporate existence (*infra*, p. 21). The officers and directors of Joyce Agency, prior to the initiation of dissolution proceedings, were also closely affiliated with Goldblatt. The former president-treasurer of Joyce (Edwin G. Boltz), whose affidavit is annexed to the memorandum filed in this Court on January 6, 1955, handled the labor relations for Goldblatt Bros., Inc. (R. 70). The former sec-

retary and office manager for Joyce, Marcella Main, worked for Boltz in his labor relations business, receiving part of her salary from Boltz and part from respondent Joyce Agency, Inc. (*infra*, p. 22; R. 70). One of the partners in the law firm of Pritzker, Pritzker and Clinton (which has been representing Joyce Agency, Inc., throughout the present litigation) was one of the original incorporators of Goldblatt Bros., and two of the partners have owned stock in Goldblatt and have been officers and directors of Goldblatt (*infra*, pp. 23–24).

The law firm of Pritzker, Pritzker and Clinton also represents Joyce Agency, Inc., in two civil actions instituted by employees and pending in the United States District Court for the Northern District of Illinois, for unpaid overtime compensation, liquidated damages, and attorneys' fees amounting to more than $8,000.00, pursuant to the provisions of Section 16 (b) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C., 201 *et seq.*). These employee suits involve issues of law identical to those tendered in the instant case. On April 13, 1953, both cases (*Chrysler* v. *Joyce Agency, Inc.*, Civil No. 50 C 10, and *Sullivan* v. *Joyce Agency, Inc.*, Civil No. 51 C 114) were, by order of District Judge Sam J. Perry, placed on the passed case calendar pending final determination of the instant case (*infra*, pp. 25–26).

The brief on the merits, filed in this Court, on January 6, 1955, on behalf of respondent by Pritzker, Pritzker and Clinton, still asserts that the

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guards and watchmen working at the Goldblatt warehouses are not within the coverage of the Act.

The record does not show what, if any, provision has been made for satisfaction of the injunction decree or of the judgment for costs and disbursements entered by the district court against Joyce Agency, Inc., in the pending case. Nor does the record show what, if any, provision has been made for the satisfaction of any judgment that may be entered against Joyce Agency, Inc., in the pending employee suits. See Section 157.80 (e) of the Illinois Business Corporation Act, quoted *supra*, pp. 4–5.

ARGUMENT

Respondent, while asserting that its dissolution has made this action moot, does not aver that the action has abated by its dissolution or that it is without capacity to sue or be sued. Indeed, in view of its own conduct in proceeding with its appeal subsequent to its dissolution (*supra*, p. 3), respondent "is hardly in a position to assert that it is non-existent and incapable of maintaining and defending pending suits." See *Pease* v. *Rathbun-Jones Engineering Co.*, 243 U. S. 273, 277.

Under the plain terms of the Illinois Corporation law, respondent still exists for purposes of litigating "any remedy" and any pending "*action or proceeding* by or against the corporation" "for any right or claim existing, or any liability incurred, prior to such dissolution * * *" (Section 157.94, quoted *supra*, p. 5) (emphasis added).

Moreover, respondent's certificate of dissolution was conditioned on its representation that "adequate provision has been made for the satisfaction of any judgment, *order, or decree* which may be entered against it in any pending suit" (Section 157.80, quoted *supra*, pp. 4–5). [Emphasis added.] It is therefore plain, we submit, that this action has not abated by the dissolution and that respondent still has capacity to be sued and to have an effective judgment rendered against it.

It is equally clear that the case is not moot, for the very employment practices which are the subject of the suit are still being continued by the real party in interest, Goldblatt Bros., Inc., which actively participated in and indeed controlled these practices even prior to the dissolution of respondent. There is thus a real and existing controversy in which effectual relief may be granted pursuant to respondent's responsibility under its articles of dissolution and also by reason of Section 65 (d) of the Federal Rules of Civil Procedure.[4]

Respondent prosecuted the appeal in this case on the assumption that the action had not abated and that the case was not moot. We can only presume that the sole purpose for its assertion of mootness at this late date is to forestall this Court's de-

[4] Section 65 (d) provides (in pertinent part):

"Every order granting an injunction and every restraining order * * * is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and *upon those persons in active concert or participation with them* who receive actual notice of the order by personal service or otherwise." [Emphasis added.]

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termination of a live issue and to avoid the entry of a judgment which would be binding on Goldblatt Bros., Inc., and which would serve as a precedent in the pending actions by employees against respondent. Such an apparent attempt to frustrate the judicial process and the enforcement of an important remedial Act of Congress need not and should not be indulged.

While we believe that a judgment on the merits against respondent Joyce Agency, Inc., would provide effectual relief against the same practices by Goldblatt Bros., Inc., any doubt can be resolved by joining or substituting Goldblatt Bros., Inc., as a party-respondent. For the reasons we have stated and will discuss more fully below, we submit that the Court should proceed with the determination of the merits of this case and should grant this motion to join or substitute Goldblatt Bros., Inc., as a party.

I

THIS ACTION HAS NOT ABATED AGAINST JOYCE AGENCY, INC.

It is well settled that although a corporate entity may be dissolved for most purposes, it may "yet have enough life remaining to litigate its actions. All that is necessary is a statute so providing." *Defense Supplies Corporation* v. *Lawrence Warehouse Co.*, 336 U. S. 631, 634–635. The Illinois Corporation law in plain terms provides "enough life" in a dissolved corporation to preserve "any remedy" against such corporation "for *any right*

or claim existing, or *any liability* incurred, prior to such dissolution if *action or other proceeding* thereon is commenced within two years after the date of such dissolution," and to permit the prosecution or defense of "any such action or proceeding" by the dissolved corporation "in its corporate name" (Section 157.94, quoted *supra*, p. 5). [Emphasis added.] Moreover, under its articles of dissolution, respondent remains responsible "for the satisfaction of *any judgment, order, or decree* which may be entered against it in any pending suit" (Section 157.80, quoted *supra*, pp. 4–5). [Emphasis added.]

There is no question that this action was instituted and pending prior to the dissolution of respondent, and indeed two years has not yet expired since its certificate of dissolution was issued on October 19, 1953.

The language of the Illinois statute continuing the corporate life for purposes of litigation is plain and should be applied in this case. It has been repeatedly held that such statutes "prolonging the existence of a dissolved corporation are remedial and should be given a liberal construction." *Eastman, Gardiner & Co.* v. *Warren*, 109 F. 2d 193 (C. A. 5); *Bahen & Wright* v. *Commissioner of Internal Revenue*, 176 F. 2d 538 (C. A. 4): "Statutes of this type are broadly remedial and should be liberally construed. * * * The word 'proceeding' is obviously broader than action or suit and should be given full effect in order to achieve the fundamental

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purpose of the statute." (*id.* at 539); *U. S.* v. *P. F. Collier & Son Corp.*, 208 F. 2d 936 (C. A. 7), holding that—

"* * * the word 'suit' or the word 'action' standing alone might reasonably be held as not including a criminal prosecution, but *when the word 'proceeding' is added we think a combination is presented which is well near inclusive of all forms of litigation.* * * * The words 'any action, suit, or proceeding' in their ordinary and generally accepted meaning and use embrace, so we think, all forms of litigation, civil, criminal, bankruptcy and admiralty. The words carry such a plain meaning that they are hardly open to construction, and their employment leaves no room to speculate on the legislative intent" (*id.* at 939, 940). [Emphasis added.] See also: *National Labor Relations Bd.* v. *Timken Silent A. Co.*, 114 F. 2d 449, 450 (C. A. 2); *Helvering* v. *South Penn Oil Co.*, 68 F. 2d 420, 424 (C. A. D. C.).

The terms "proceeding," "action," and "judgment, order, or decree," used in Sections 157.94 and 157.80 of the Illinois Corporation Law, are commonly used to include or to characterize suits for injunctions. Under Rules 1 and 2 of the Federal Rules of Civil Procedure, for example, suits in equity are included within the term "civil actions." "Action" is specifically used in conjunction with injunction in Rule 62 (a) as "action for an injunction" and in Rule 65 (e) as actions to enjoin. "Judgment" as used in the Rules explicitly "includes a decree and any order from which an ap-

peal lies" (Rule 54 (a)), and Rule 62 (c) uses the term "judgment granting * * * an injunction."[5]

This is not a case, therefore, in which the action has abated or in which the respondent before this Court is without capacity to be sued. Compare *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671, where a corporate respondent had been dissolved under the Louisiana law which contained no provision for the continued existence of the corporate life even for purposes of suit. The reasons which deterred this Court from proceeding to a determination of the merits in the *Reuter* case are not here present. The instant case differs from *Reuter* in two significant respects: (1) the applicable State statute does provide continuing life in the dis-

[5] It may be noted that there are no Illinois state court decisions construing the present language of the Illinois law. In the case of *Galter* v. *Federal Trade Commission*, 186 F. 2d 810 (C. A. 7), however, the court of appeals construed the present language as being no broader than the previous narrow language of the Illinois statute which preserved the corporate life "for the purpose only of collecting the debts due said corporation, and selling and conveying the property and effects thereof." On what appears to be a plainly erroneous assumption that the present broader language of the Illinois law did not intend to continue the existence of a dissolved corporation except for purposes of winding up its affairs, the *Galter* decision held that a dissolved Illinois corporation was not "subject to an injunction against acts to be performed in the future, especially where, as here, the acts sought to be enjoined are in no way related to the winding up of the corporate affairs * * *" 186 F. 2d at 815–816. This narrow construction excluding proceedings for injunctions from the present broad statutory language seems particularly unwarranted in view of the preservation in the Illi-

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solved corporation for purposes of litigation, and (2) a specific motion to join or substitute the real party in interest as party-respondent is here being made.

II

THE ACTION IS NOT MOOT AND SHOULD BE DETERMINED BY THIS COURT ON THE MERITS, WITH GOLDBLATT BROS. INC. JOINED OR SUBSTITUTED AS PARTY-RESPONDENT

Respondent's only contention is that the action has become moot, a plainly untenable contention. For this Court has held, specifically with reference to an injunction action to restrain violations of the Fair Labor Standards Act, that even where an action has abated because of the absence of any stat-

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nois law of the dissolved corporation's responsibility for satisfaction of a "decree" as well as "any judgment" and "order" (Section 157.80 (e), quoted *supra*, pp. 4–5).

The *Galter* decision also seems plainly inconsistent with the subsequent decision of the Seventh Circuit, about three years later, construing similar language of the Delaware statute in the case of *U. S.* v. *Collier & Son*, *supra*, p. 13.

Moreover, the instant case differs from the *Galter* case in at least three respects: (1) the acts here sought to be enjoined might well be regarded as related to the winding up of the corporate affairs inasmuch as respondent's employees and functions have been transferred to a closely identified company which is continuing the practices here in issue; (2) a judgment and decree was entered in the instant case *prior to* the dissolution of the corporation, whereas the order in the *Galter* case was not entered until *after* the corporate dissolution; and (3) the judgment in the instant case includes, in addition to an injunction, a monetary judgment for costs and disbursements.

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ute prolonging the existence of a dissolved corporation for purposes of litigation, it does not follow that the action or the issues have become moot. *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671, 674, 676. "Not only is such an injunction enforcible by contempt proceedings against the corporation, its agents and officers and those individuals associated with it in the conduct of its business, * * * but it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons. The vitality of the judgment in such a case survives the dissolution of the corporate defendant. * * * And these principles may be applied in fuller measure in furtherance of the public interest, which here the petitioner represents, than if only private interests were involved." *Id.* at 674–675.*

Under the circumstances of the instant case, the disposition which this Court made of the *Reuter* case would not adequately protect petitioner's rights nor the public interest in the enforcement of the Fair Labor Standards Act. A determination on the merits by this Court is necessary not only to prevent frustration of the appellate procedure but

* Neither of the cases relied upon in respondent's memorandum is pertinent. Both of those cases were suits to enjoin Federal officers from seizing or interfering with plaintiffs' property, where the actions became moot because the properties had been returned by the Government to the owners. *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Montgomery Ward & Co.* v. *United States*, 326 U. S. 690.

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to prevent what appears to be an attempt by respondent, and by the real party in interest which dominates respondent, to block enforcement of the judgment entered in this case and to delay the enforcement of the Act by prolonging litigation over the issues here presented. It is apparent from the brief on the merits filed on behalf of Joyce Agency, Inc., that, absent a determination on the merits by this Court, there will be a continued or renewed assertion that the Act is inapplicable to the guards and watchmen transferred to the payroll of Goldblatt Bros. It is also apparent that, unless this Court determines the merits, the employees whose suits against Joyce Agency, Inc., have been delayed pending final determination of the instant case will be deprived of a decision which would serve as a binding precedent, and will therefore be subjected to continuing extended litigation.

As this Court stated in the *Reuter* case, even in the absence of jurisdiction to consider the merits because of the respondent's incapacity, the Court "may make such disposition of the whole case as justice may require." 321 U. S. at 677. The very least remedy which justice requires is that the judgment of the court of appeals be vacated and the judgment of the district court reinstated, as though respondent Joyce Agency, Inc., had taken no appeal. *Walling* v. *James V. Reuter Co., supra,* at 677–678. In the instant case, however, this remedy does not adequately protect petitioner nor the public interest, and relief should not be so limited.

The disposition which justice requires in the instant case, we believe, is that this Court proceed with a determination of the merits and join or substitute Goldblatt Bros., Inc., as a party-respondent. While this Court's rules do not provide for joinder or substitution for a dissolved corporation, such procedure is suggested by the *Reuter* decision (321 U. S. at 675) and would be in accord with Rules 21, 25 (c), and 65 (d) of the Federal Rules of Civil Procedure. Goldblatt Bros., Inc., is, and throughout the period involved in this litigation has been, "in active concert or participation" with respondent in the acts sought to be enjoined. Under Rule 65 (d) (quoted *supra,* p. 10, n. 4), Goldblatt would doubtless be bound by the injunction decree here sought. Under Rule 21, "parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." And under Rule 25 (c), "in case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred *to be substituted in the action or joined with the original party.*" [Emphasis added.] Joinder or substitution seems particularly appropriate in the instant case in view of the fact that the employees and functions involved in this litigation have been transferred to Goldblatt Bros., Inc., and it is evident that Goldblatt, unless made a party,

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will contest the application to it of any judgment that may be entered in the instant action.

CONCLUSION

It is respectfully submitted that respondent's claim of mootness should be rejected, and that Goldblatt Bros., Inc., should be ordered joined or substituted as party-respondent.

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,
United States Department of Labor.

JANUARY 1955.

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1954

No. 230

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOYCE AGENCY, INC., RESPONDENT

Affidavit

STATE OF ILLINOIS,
County of Cook, ss:

HERMAN GRANT, being first duly sworn, deposes and says that he is, and at all times during the pendency of the above-styled cause was, employed by the United States Department of Labor as Regional Attorney at Chicago, Illinois; and upon information and belief further says that:

1. Neither petitioner nor the Court of Appeals was notified of the dissolution of respondent Joyce Agency, Inc., until the filing of the Memorandum by respondent in this Court on January 6, 1955:

2. Goldblatt Bros., Inc., for many years and throughout the period covered by this litigation has been the principal and substantially the sole account of respondent Joyce Agency, Inc.

3. The guards and watchmen involved in the pending litigation were transferred from the pay

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roll of respondent Joyce Agency, Inc., to the pay roll of Goldblatt Bros., Inc., on or about February 1, 1953, and many of the said guards and watchmen have continued in the employ of Goldblatt Bros., Inc., until the present time.

4. Since their transfer from the pay roll of respondent Joyce Agency, Inc., to the pay roll of Goldblatt Bros., Inc., as aforesaid, the guards and watchmen referred to in paragraph 3 hereof have worked in excess of 40 hours during many workweeks without receiving compensation for their employment in excess of 40 hours during such workweeks at rates not less than one and one-half times the regular rates at which they are employed.

5. Respondent Joyce Agency, Inc., prior to an article of amendment filed on November 26, 1947, was known as Joyce Detective Agency, Inc. Joyce Detective Agency, Inc., incorporated under the laws of the State of Illinois on November 13, 1936, was formed to provide a detective and watchman service for Goldblatt Bros., Inc. Goldblatt Bros., Inc., furnished the necessary capital to organize said corporation. Goldblatt Bros., Inc., caused the stock certificate representing the stock in Joyce Detective Agency, Inc., to be issued to one of its nominees, who, in turn assigned said stock certificate in blank and delivered same to the custody of Goldblatt Bros., Inc. Goldblatt Bros., Inc., has retained ownership and control of said stock during the corporate existence of Joyce Agency, Inc.

6. Prior to and during the period of the pending litigation in the trial court, Goldblatt Bros., Inc., was furnished weekly with detailed cash disbursement reports and was billed for the total detective, day guard, and night watchman pay roll, plus 3.6

per cent of the gross for social security and unemployment compensation contributions, plus approximately 2½ percent for services. Goldblatt Bros., Inc., issued its check to Joyce Agency, Inc., for the total amount thus billed to it by Joyce Agency, Inc. An auditor from Goldblatt Bros., Inc., audited all of the books of Joyce Agency, Inc.

7. The former president-treasurer of Joyce Agency, Inc., Edwin G. Boltz, whose affidavilt dated January 4, 1955, is annexed to the Memorandum filed in this Court on behalf of Joyce Agency, Inc., simultaneously carried on a labor relations business under the name of Boltz and Boltz, which handled the labor relations for Goldblatt Bros., Inc. (R. 70).

8. The former secretary and office manager for respondent Joyce Agency, Inc., Marcella Main, also worked for Boltz and Boltz, receiving $65.00 a week of her compensation from Joyce Agency, Inc., and $10.00 a week from Boltz and Boltz.

9. On and after July 1, 1953, and at all times referred to in paragraphs 5, 6, 7, 8 and 9 of the affidavit of Edwin G. Boltz dated January 4, 1955, Edwin G. Boltz was not the president of respondent Joyce Agency, Inc.; nor was he an officer or director of respondent Joyce Agency, Inc. On and after July 1, 1953, and at all times referred to in paragraphs 5, 6, 7, 8 and 9 of the said affidavit, Robert Gerlich and Gertrude Holter were the officers and directors of respondent Joyce Agency, Inc.

10. At the time of the filing of the Statement of Intent to Dissolve Joyce Agency, Inc., and at the time of the issuance of the certificate of dissolution, the officers and directors of respondent Joyce Agency, Inc., were Robert Gerlich, president, and

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Gertrude Holter, secretary, both employees of Goldblatt Bros., Inc.

11. Robert Gerlich and Gertrude Holter are, and for many years past have been, employees of Goldblatt Bros., Inc. Robert Gerlich is, and has been, since at least 1943, employed by Goldblatt Bros., Inc., in its central offices located at 333 South State Street, Chicago, Illinois. Gertrude Holter is, and has been, since at least 1936, employed by Goldblatt Bros., Inc., in its central offices located at 333 South State Street, Chicago, Illinois. William A. Goldman is, and has been, since at least 1947, employed by Goldblatt Bros., Inc., in its central offices located at 333 South State Street, Chicago, Illinois. Robert Gerlich is employed as assistant tax manager, Gertrude Holter is employed as personal secretary to William A. Goldman, and William A. Goldman is employed as tax manager by Goldblatt Bros., Inc.

12. Joyce Agency, Inc., and Goldblatt Bros., Inc., have for many years and throughout the pending litigation retained the same legal counsel, Stanford Clinton of Pritzker, Pritzker & Clinton, who has represented Joyce Agency, Inc., throughout the present litigation and also represented Goldblatt Bros., Inc., throughout the extended litigation between the Department of Labor and Goldblatt Bros., Inc., under the Fair Labor Standards Act, which involved two trials and three appeals to the Court of Appeals extending over a period of almost 8 years (from April 16, 1940 to March 25, 1948). See *Walling* v. *Goldblatt Bros.*, 128 F. (2d) 778 (C. A. 7), certiorari denied, 318 U. S. 757; 152 F. (2d) 475 (C. A. 7), certiorari denied, 328 U. S. 854; 166 F. (2d) 387 (C. A. 7). Abram N. Pritzker,

one of the partners in the law firm of Pritzker, Pritzker & Clinton, was one of the original incorporators of Goldblatt Bros., Inc., when it was first organized in 1928. In the articles of incorporation of Goldblatt Bros., Inc., he is shown as owning 50 shares of stock. Nicholas Pritzker is also a partner in said law firm, and he is likewise shown in the said articles of incorporation of Goldblatt Bros., Inc., as owning 50 shares of stock. Abram Pritzker and Nicholas Pritzker have been officers and directors of Goldblatt Bros., Inc.

13. On September 28, 1953, Robert Gerlich and Gertrude Holter, as president and secretary, respectively, of respondent Joyce Agency, Inc., executed the statement of intent to dissolve referred to in paragraph 6 of the said affidavit of Edwin G. Boltz dated January 4, 1955, and on the same date, to wit, September 28, 1953, Robert Gerlich acknowledged that he signed said document as president of respondent Joyce Agency, Inc., and declared under oath that the statements therein contained are true, before William A. Goldman, notary public in and for Cook County, Illinois.

14. On October 16, 1953, Robert Gerlich and Gertrude Holter, as president and secretary, respectively, of respondent Joyce Agency, Inc., executed the articles of dissolution referred to in paragraph 7 of the said affidavit of Edwin G. Boltz dated January 4, 1955. Robert Gerlich acknowledged that he signed said document as president of respondent Joyce Agency, Inc., and declared under oath that the statements therein contained are true, before William A. Goldman, notary public in and for Cook County, Illinois, said acknowledgment and declaration bearing the date October 6, 1953.

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15. Under the file mark of the Illinois Secretary of State stamped on the back of the statement of intent to dissolve, referred to in paragraph 6 of the said affidavit of Edwin G. Boltz dated January 4, 1955, the following words and figures are inscribed:

Please mail to
B. Rosencranz
333 S. State
Legal
Chgo. Ill

Bernard Rosencranz is an attorney employed on the legal staff of Goldblatt Bros., Inc. The central offices of Goldblatt Bros., Inc., are located at 333 South State Street, Chicago, Illinois.

16. The name of Eugene Tomczak and the address 333 S. State Street, Chicago, Illinois, have been typewritten and afterwards partially erased under both article 2 and article 3 of the statement of intent to dissolve, referred to in paragraph 6 of the said affidavit of Edwin G. Boltz dated January 4, 1955, wherein the names and addresses of the officers and directors of the corporation are required to be set forth. Eugene Tomczak was employed by respondent Joyce Agency, Inc., as supervisor of all day guards and detectives prior to about February 1, 1953, when he was transferred to the pay roll of Goldblatt Bros., Inc. The records of the Secretary of State of Illinois show that the said Eugene Tomczak was vice-president and a director of respondent Joyce Agency, Inc., during the year 1953.

17. Respondent Joyce Agency, Inc., is defendant in two civil actions instituted by employees and pending in the United States District Court for the

Northern District of Illinois, wherein plaintiffs demand judgments for unpaid overtime compensation, liquidated damages, and attorneys' fees amounting to more than $8,000.00, pursuant to the provisions of section 16 (b) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C., 201 *et seq.*). The said actions involve issues of law identical to those tendered in the above-styled cause. On April 13, 1953, both cases (*Chrysler* v. *Joyce Agency, Inc.*, Civil No. 50 C 10, and *Sullivan* v. *Joyce Agency, Inc.*, Civil No. 51 C 114) were by motion order of the Honorable Sam J. Perry, D. J., placed on the passed case calendar pending final determination of the above-styled cause.

18. Annexed hereto are duly certified photostatic copies of the following documents referred to herein and in the said affidavit of Edwin G. Boltz dated January 4, 1955:

(a) Statement of Intent to Dissolve by Voluntary Consent of Shareholders Pursuant to Section 75 of "The Business Corporation Act," referred to in paragraph 6 of the said affidavit of Edwin G. Boltz and in paragraphs 13, 15, and 16 hereof as the "statement of intent to dissolve." Said document is marked Exhibit A for identification.

(b) Articles of Dissolution Pursuant to Section 80 of "The Business Corporation Act," with Certificate annexed, referred to in paragraphs 7 and 8 of the said affidavit of Edwin G. Boltz. Said document is marked Exhibit B for identification.

(c) Dockets showing statuses of *George Chrysler* v. *Joyce Agency, Inc.*, Civil No. 50 C 10, and *Eugene D. Sullivan* v. *Joyce Agency, Inc.*, Civil No. 51 C 114, pending in the United States District Court for the

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Northern District of Illinois. Said documents are marked Exhibits C–1 and C–2, respectively.

/s/ Herman Grant.
HERMAN GRANT.

Subscribed and sworn to before me, the undersigned authority, in my aforesaid jurisdiction on January 14, 1953.

/s/ GEORGE J. CEURNKA,
Notary Public.

My commission expires June 29, 1957.

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Date Paid 9-30-53
Filing Fee $
Clerk VEL

(TO BE FILED IN DUPLICATE)

STATEMENT OF INTENT TO DISSOLVE BY VOLUNTARY CONSENT OF SHAREHOLDERS PURSUANT TO SECTION 75 OF "THE BUSINESS CORPORATION ACT" OF

JUDGE SHOES, INC.,

To CHARLES F. CARPENTIER,
Secretary of State,
Springfield, Illinois.

The undersigned corporation, for the purpose of dissolving the corporation, and pursuant to the provisions of Section 75 of "The Business Corporation Act" of the State of Illinois, hereby executes the following statement of intent to dissolve.

Article 1. The name of the corporation is JUDGE SHOES, INC.

Article 2. The names and respective addresses, including street and number, if any, of its officers are:

Name	Number	Street	City	State
Robert Gerlich	14736 S. Normal Avenue		Riverdale	Illinois
Gertrude Reiter	2010 Bradley Pl.		Chicago	Illinois

Article 3. The names and respective addresses, including street and number, if any, of its directors are:

Name	Number	Street	City	State
Robert Gerlich	14736 S. Normal Avenue		Riverdale	Illinois
Gertrude Reiter	2010 Bradley Pl.		Chicago	Illinois

Article 4. The agreement signed by all of the shareholders of record of the corporation, consenting to its dissolution, is as follows:

"We, the undersigned being all of the shareholders of the corporation do hereby agree that this corporation be dissolved and the proper officers of this company are hereby authorized and directed to take such steps as are necessary to dissolve the same."

A

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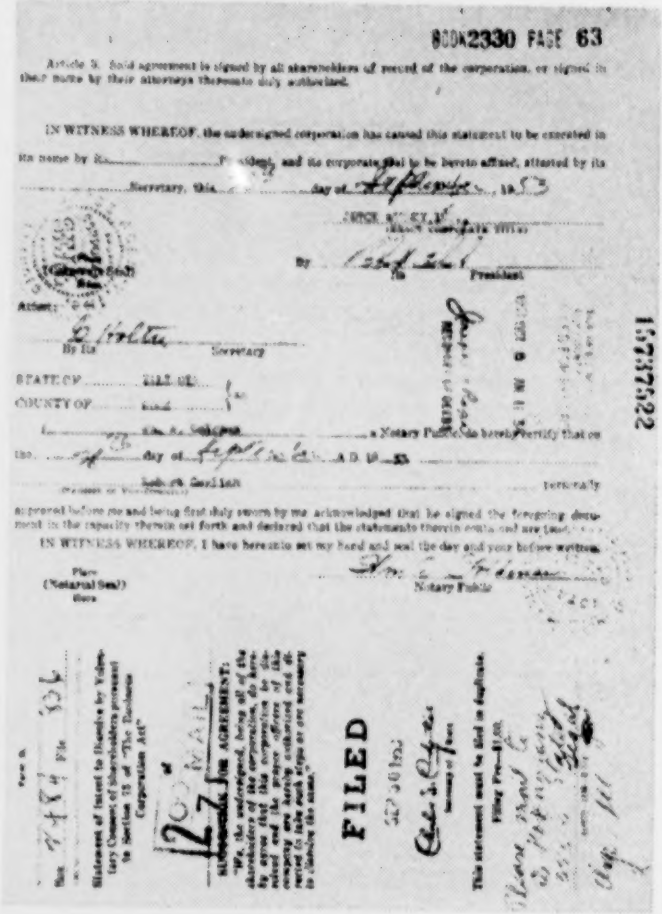

BOOK2330 PAGE 63

Article 9. Said agreement is signed by all shareholders of record of the corporation, or signed in their name by their attorneys thereunto duly authorized.

IN WITNESS WHEREOF, the undersigned corporation has caused this statement to be executed in its name by its ... President, and its corporate seal to be hereto affixed, attested by its ... Secretary, this ... day of ... A.D. 19...

By ... President

Attest: ... Secretary

STATE OF ... SS.

COUNTY OF ...

I, ... a Notary Public do hereby certify that on the ... day of ... A.D. 19... personally appeared before me and being first duly sworn by me acknowledged that he signed the foregoing document in the capacity therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

Notary Public

Place (Notarial Seal) Here

Form A

No. ... File ...

Statement of Intent to Dissolve by Voluntary Consent of Shareholders pursuant to Section 13 of "The Business Corporation Act"

12 Mail

AGREEMENT

"We, the undersigned, being all of the shareholders of the corporation, do hereby agree that this corporation be dissolved and the proper officers of the corporation are hereby authorized and directed to do all such things as are necessary to dissolve the same."

FILED

SEP 30 1983

Secretary of State

This statement must be filed in duplicate. Filing Fee—$10.00.

1533622

STATE OF ILLINOIS, }
County of Cook } ss.

I, JOSEPH F. ROPA, Recorder of Deeds, and Keeper of the Records of said Recorder of Deeds, in and for said County, in the State aforesaid, Do Hereby Certify, that the following is a true and correct photographic copy of the record of a certain Instrument filed in said Office the Sixth day of October A. D. 1953 as Document No. 15732522 and recorded in Book 2230 of Records, at Page 62

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal at Chicago, this Thirteenth day of January A. D. 19 54.

Recorder of Deeds

B

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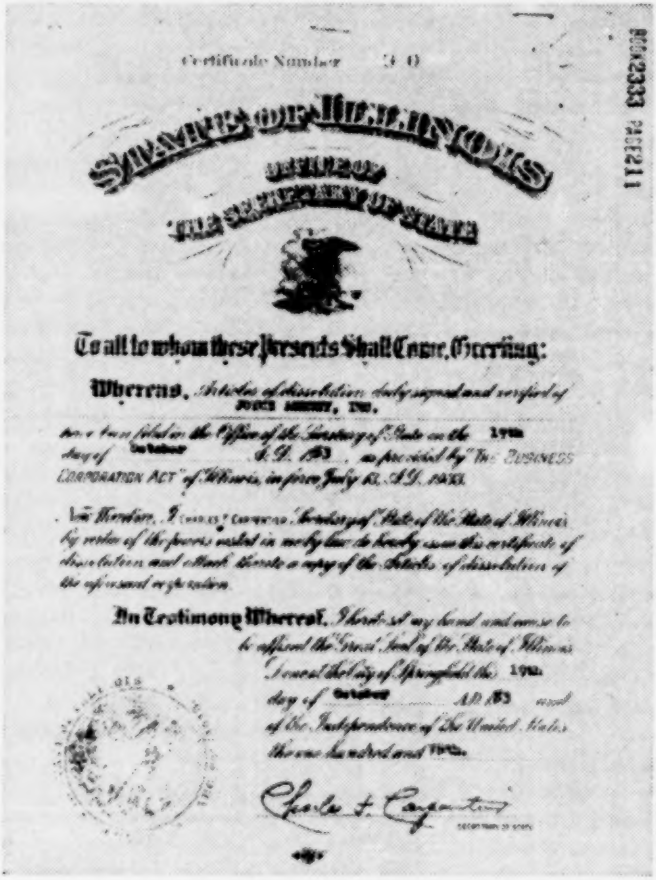

Certificate Number 340

STATE OF ILLINOIS

OFFICE OF

THE SECRETARY OF STATE

To all to whom these Presents Shall Come, Greeting:

Whereas, Articles of dissolution, duly signed and verified of JOHN DEERE, INC.

have been filed in the Office of the Secretary of State on the 17th day of October A.D. 1983, as provided by "THE BUSINESS CORPORATION ACT" of Illinois, in force July 61, A.D. 1983.

Now Therefore, I, JIM EDGAR, Secretary of State of the State of Illinois by virtue of the powers vested in me by law do hereby issue this certificate of dissolution and attach thereto a copy of the Articles of dissolution of the aforesaid corporation.

In Testimony Whereof, I hereunto set my hand and cause to be affixed the Great Seal of the State of Illinois. Done at the City of Springfield this 17th day of October A.D. 1983 and of the Independence of the United States the one hundred and 19th.

Secretary of State

B00233 B00211

BOOK2333 PAGE212

Form 9

Date Paid 10-19-53
Filing Fee $ 1
Clerk 102 L

Form F.

(These articles to be filed in triplicate.)

ARTICLES OF DISSOLUTION PURSUANT TO SECTION 98 OF "THE BUSINESS CORPORATION ACT"

OF

JUDGE AGENCY, INC., a corporation

TO CHARLES F. CARPENTIER,
Secretary of State,
Springfield, Illinois

The undersigned corporation, for the purpose of dissolving, and pursuant to the provisions of "The Business Corporation Act" of the State of Illinois relating to the dissolution of said corporation, hereby executes the following articles of dissolution:

Article 1. Name of corporation is Judge Agency, Inc.,

Article 2. On the 30th day of September, A.D. 19 53 the corporation filed with the Secretary of State, and on the 8th day of October, A.D. 19 53 with the Recorder of Deeds of the County in which the registered office of the corporation is situated, a statement of intent to dissolve.

*Article 3. All debts, obligations and liabilities of the corporation have been paid and discharged, or that adequate provision has been made therefor.

*Article 4. All the remaining property and assets of the corporation have been distributed among its shareholders, in accordance with their respective rights and interests.

*Article 5. There are no suits pending against the corporation in any court, or that adequate provision has been made for the satisfaction of any judgment, order, or decree which may be entered against it in any pending suit.

(over)

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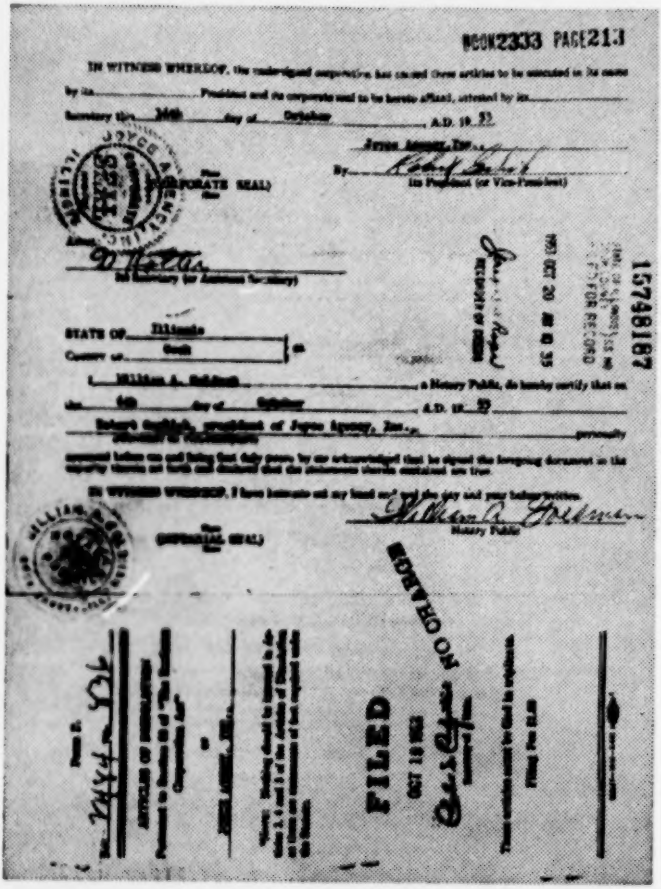

BOOK2333 PAGE213

IN WITNESS WHEREOF, the undersigned corporation has caused these articles to be executed in its name by its President and its corporate seal to be hereto affixed, attested by its Secretary this 14th day of October A.D. 19 57

Joyce Agency, Inc.

By (Its President (or Vice-President))

(CORPORATE SEAL)

Attest:

(Its Secretary (or Assistant Secretary))

STATE OF Illinois
County of Cook } ss.

I, William A. Goldsmith, a Notary Public, do hereby certify that on the 14th day of October A.D. 19 57

Robert Goldish, president of Joyce Agency, Inc., personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me and being first duly sworn, by me acknowledged that he signed the foregoing document as the voluntary act of said corporation and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal.

William A. Goldsmith
Notary Public

(NOTARIAL SEAL)

15748187

RECORDED FOR RECORD
1957 OCT 20 AM 8 55

FILED
OCT 18 1957
SECRETARY OF STATE
STATE OF ILLINOIS

STATE OF ILLINOIS, }
County of Cook. } ss.

I, JOSEPH F. ROPA, Recorder of Deeds, and Keeper of the Records of said Recorder of Deeds, in and for said County, in the State aforesaid, Do Hereby Certify, that the following is a true and correct photographic copy of the record of a certain Instrument filed in said Office the Twentieth day of October A. D. 19 52 as Document No. 15748187 and recorded in Book 2333 of Records, at Page 221.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal at Chicago, this Thirteenth day of January A. D. 19 55.

Recorder of Deeds.

C–1

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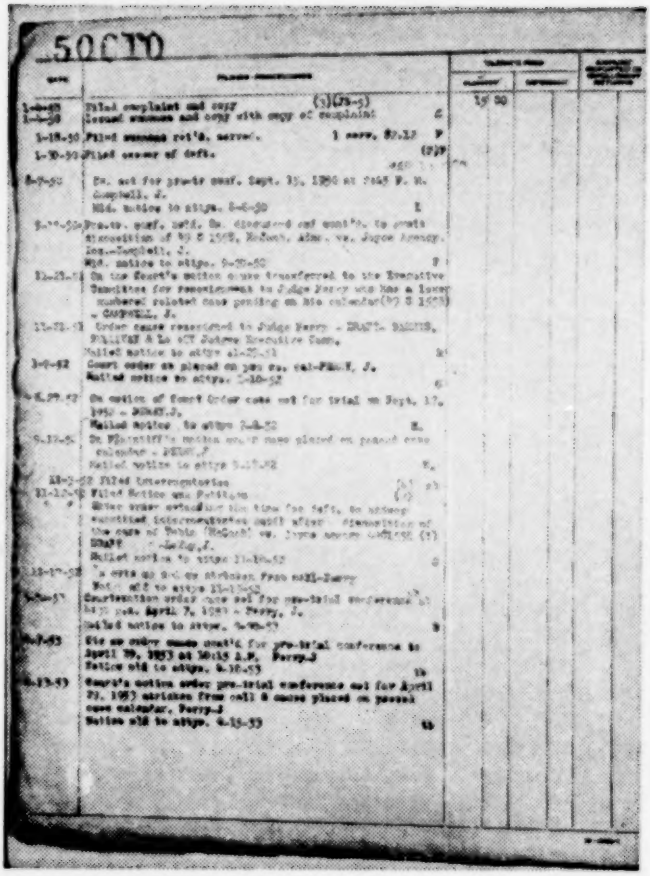
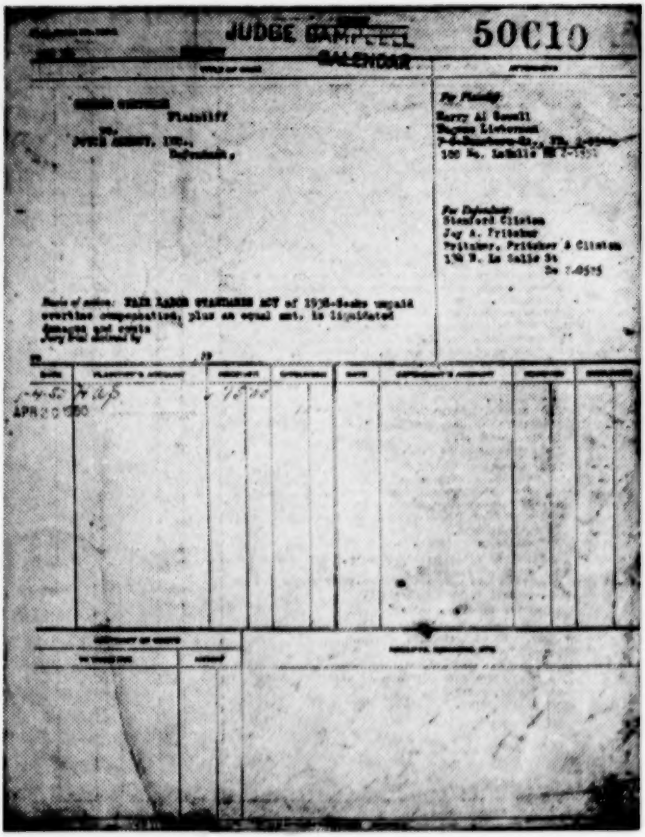


50 C 170

Date	Proceedings	Judgment	Satisfaction	Amount of Judgment and Costs
1-6-50	Filed complaint and copy (1)(75-5)			35 00
1-6-50	Issued summons and copy with copy of complaint			
1-18-50	Filed summons ret'd. served. 1 serv. $2.12			
1-30-50	Filed answer of defts. (pp)			
8-7-50	Stip. ext for pre-tr conf. Sept. 15, 1950 at 2:45 P. M. Campbell, J.			
	Mailed notice to attys. 8-8-50			
9-14-50	Pre-tr. conf. held. Ds. discovered and contds. to pre-trial discussion of 50 C 1508, McGrath, Atty. Gen. vs. Joyce Armory, Inc.-Campbell, J.			
	Mailed notice to attys. 9-20-50			
12-21-50	On the Court's motion cause transferred to the Executive Committee for reassignment to Judge Perry who has a lower numbered related case pending on his calendar(50 C 1508) - CAMPBELL, J.			
12-21-50	Order cause reassigned to Judge Perry - DRAFT, DAIRIE, PHILLIPS & La OCT Judges Executive Comm.			
	Mailed notice to attys 12-22-50			
3-9-52	Court order ds placed on pre-tr. cal-Perry, J.			
	Mailed notice to attys. 3-10-52			
4-8-52	On motion of Court Order case set for trial on Sept. 15, 1952 - Perry, J.			
	Mailed notice to attys 4-8-52			
9-12-52	On Plaintiff's motion order case placed on peanut case calendar - Perry, J.			
	Mailed notice to attys 9-17-52			
10-2-52	Filed Intervenorstoria (pp)			
11-12-52	Filed Notice and Petition (pp)			
	Enter order extending the time for defts. to answer amended intervenorstoria until after disposition of the case of John McGrath vs. Joyce Armory Company (1) Draft - Perry, J.			
	Mailed notice to attys 11-20-52			
12-17-52	Order up writ of Mandamus from mail-Perry			
	Mot. of D to stay 12-17-52			
2-6-53	Continuation order case set for pre-trial conference at 2:30 p.m. April 7, 1953 - Perry, J.			
	Mailed notice to Atty. 2-10-53			
4-7-53	Stip and order cause set for pre-trial conference to April 28, 1953 at 10:15 A.M. Perry,J			
	Notice sld to attys. 4-10-53			
4-13-53	Court's motion order pre-trial conference set for April 28, 1953 striken from call & cause placed on peanut case calendar, Perry,J			
	Notice sld to attys. 4-15-53			



JUDGE
CALENDAR
50C10

Plaintiff
vs.
Defendant,

For Plaintiff
Harry Al Cowell
Pugnus Livironment
100 No. LaSalle

For Defendant
Stanford Clinton
Jay A. Pritzker
Pritzker, Pritzker & Clinton
140 S. La Salle St

Nature of suits: FAIR LABOR STANDARDS ACT of 1938-Seeks unpaid overtime compensation, plus an equal amt. in liquidated damages and costs
Jury Demanded

APR 20 1950

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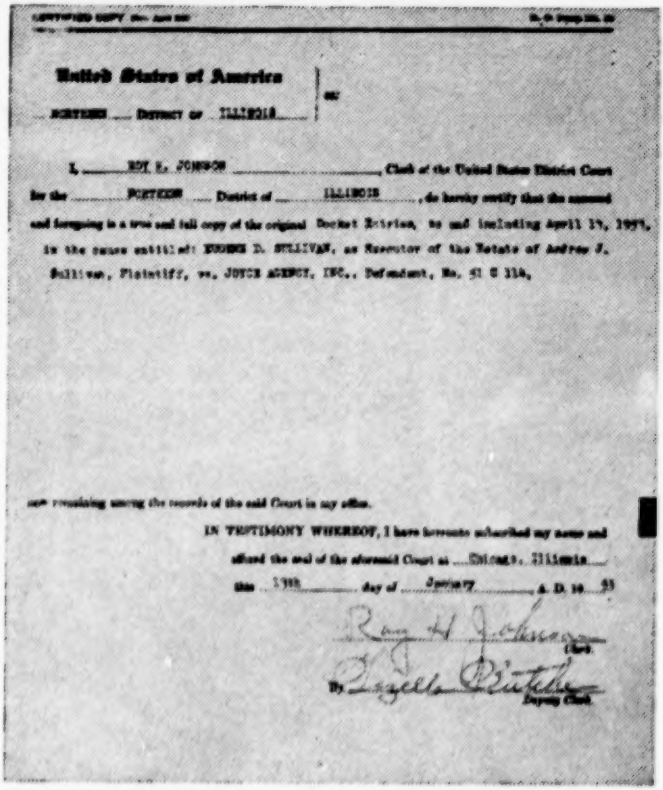


United States of America

NORTHERN District of ILLINOIS

I, ROY E. JOHNSON, Clerk of the United States District Court for the NORTHERN District of ILLINOIS, do hereby certify that the annexed and foregoing is a true and full copy of the original Docket Entries, to and including April 17, 1953, in the cause entitled: EUGENE D. SULLIVAN, as Executor of the Estate of Andrew J. Sullivan, Plaintiff, vs. JOYCE AGENCY, INC., Defendant, No. 51 C 114,

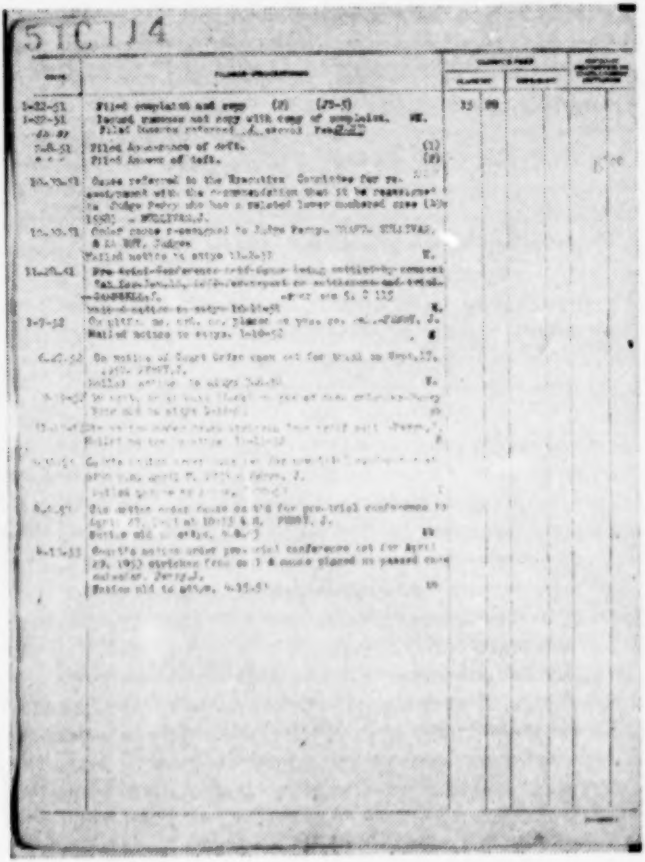
now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 19th day of January A. D. 19 53

Roy E. Johnson
Clerk.

By Rozella Pintello
Deputy Clerk.

C–2



5 IC 114

DATE	PROCEEDINGS	CLERK'S FEES		
		PLAINTIFF	DEFENDANT	
1-22-51	Filed complaint and copy (2) (75-5)	15	00	
1-27-51	Issued summons not copy with copy of complaint. WE.			
2-8-51	Filed Acceptance of Serv. (1)			
" "	Filed Answer of Defs. (2)			
10-10-51	Cause referred to the Executive Committee for re-assignment with the recommendation that it be reassigned to Judge Perry who has a related lower numbered case (No. 1558) - MCCLUNG,J.			
10-10-51	Order cause re-assigned to Judge Perry. TAYLOR, CHIEF JUDGE & LEE, Judges			
	Mailed notice to atty 10-10-51 W.			
11-28-51	Pre-trial-conference ordered upon being satisfactorily informed that [illegible] agreement on settlement and trial [illegible] - DONEGAN,J. [illegible]			
	Notice mailed to atty 12-21-51 W.			
2-9-52	On motion [illegible]			
	Mailed notice to atty. 2-12-52 W			
4-17-52	On motion of Court Order case set for trial on [illegible] - PERRY,J.			
	Mailed notice to atty 4-18-52 W.			
[illegible]	[illegible]			
[illegible]	[illegible]			
[illegible]	[illegible]			
[illegible]	[illegible]			
4-4-53	On motion order made on 4/8 for pre-trial conference to April 27, 1953 at 10:15 A.M. PERRY, J.			
	Notice mailed to atty. 4-8-53 W			
4-14-53	On motion order pre-trial conference set for April 29, 1953 stricken from docket and case placed on passed cause calendar. Perry,J.			
	Notice mailed to atty. 4-15-53 W			

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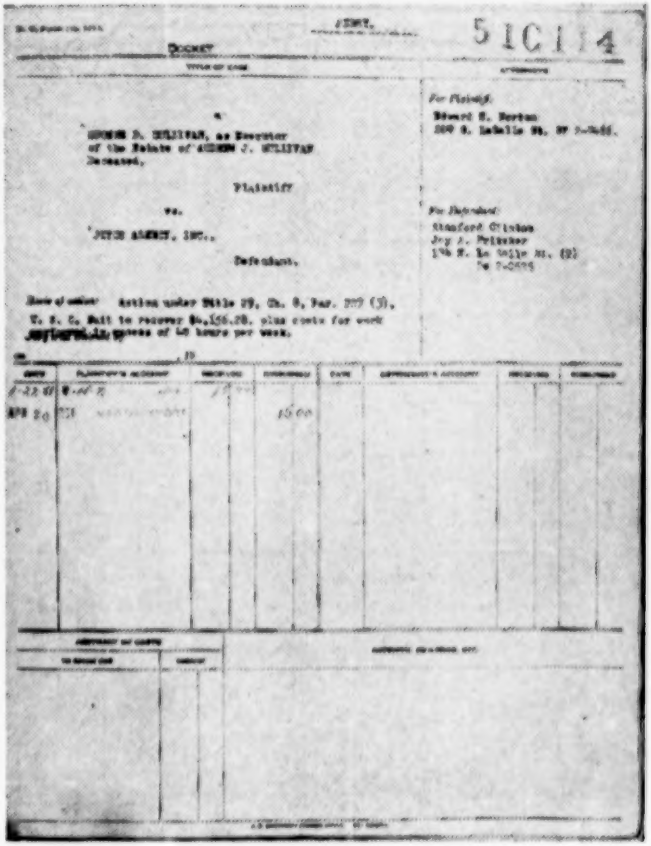

DOCKET

5 IC 1 4

For Plaintiff:
Stuart S. Berton
200 S. Labelle St. [illegible]

For Defendant:
Stanford Clinton
Jay J. Peterson
1[illegible] W. La Salle St. (2)
[illegible]

Nature of action: Action under Title 29, Ch. 8, Par. 207 (3), U. S. C. Suit to recover $4,158.28, plus costs for work [illegible] hours of 40 hours per week.

1939

DATE	PLAINTIFF'S ACCOUNT	RECEIVED	DISBURSED	DATE	DEFENDANT'S ACCOUNT	RECEIVED	DISBURSED
1-23-40	[illegible]	[illegible]					
APR 20	[illegible]		15 00				

CERTIFIED COPY (Rev. April 1954) U. S. Standard No. 30

United States of America
NORTHERN District of ILLINOIS } ss:

I, ROY H. JOHNSON, Clerk of the United States District Court for the NORTHERN District of ILLINOIS, do hereby certify that the annexed and foregoing is a true and full copy of the original Docket Entries, to and including April 19, 1955, in the cause entitled: HENRY CHEVLEN, Plaintiff vs. JOYCE AGENCY, Defendant, No. 50 C 10,

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois this 17th day of January, A. D. 19 55.

Roy H. Johnson
Clerk.

By Lyle A. Dittus
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1953

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FEBRUARY 28, 1955.

Decisions Per Curiam.

No. 230. MITCHELL, SECRETARY OF LABOR, *v.* JOYCE AGENCY, INC. Certiorari, 348 U. S. 813, to the United States Court of Appeals for the Seventh Circuit. Argued February 4, 7, 1955. Decided February 28, 1955. *Per Curiam:* The judgment of the Court of Appeals is reversed. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Phillips Co.* v. *Walling*, 324 U. S. 490. The judgment of the District Court is affirmed, and the case is remanded to the District Court. The motion of the petitioner to make Goldblatt Bros., Inc., a party in this Court is denied without prejudice to the right of the petitioner to renew said motion in the District Court, or to take such other proceedings for enforcement of the judgment as the petitioner may deem advisable and proper in the circumstances. See *Walling* v. *Reuter, Inc.*, 321 U. S. 671. *Bessie Margolin*

argued the cause for petitioner. With her on the brief were *Solicitor General Sobeloff, Sylvia S. Ellison* and *Harold S. Saxe. Stanford Clinton* argued the cause for respondent. With him on the brief was *Robert A. Sprecher.* Reported below: 211 F. 2d 241.

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